Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

October Term, 1995

UNITED STATES OF AMERICA, *EX REL.*
JAMES M. HAGOOD,

Petitioner,

vs.

SONOMA COUNTY WATER AGENCY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petition for Writ of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

1. For the public disclosure of allegations or transactions to serve as a jurisdictional bar under 31 U.S.C. § 3730(e)(4)(A) of the False Claims Act, is it necessary to establish that the suit brought by the qui tam relator was based upon that public disclosure in whole or in part?

2. For the public disclosure to serve as a jurisdictional bar under 31 U.S.C. § 3730(e)(4)(A) of the False Claims Act, is it necessary to establish that the public disclosure included an actual allegation of fraud or fraudulent misconduct under the False Claims Act?

3. For a public disclosure within an administrative hearing to serve as a jurisdictional bar under 31 U.S.C. § 3730(e)(4)(A) of the False Claims Act, is it necessary that the administrative proceeding be of such a type that would allow it the substantive power to issue a remedy that would redress fraud or fraudulent transactions?

4. If the public disclosure of allegations or transactions occurs from the news media, is that disclosure subject to the qualifications of 31 U.S.C. § 3730(e)(4) if it is to serve as a jurisdictional bar under the False Claims Act?

5. Is a qui tam relator who has direct and independent knowledge of information disqualified from being considered an original source under 31 U.S.C. § 3730(e)(4) of the False Claims Act if another person or entity has publicly disclosed that information, in whole or in part, prior to the time the qui tam action was commenced?

6. In order to qualify as an original source under 31 U.S.C. § 3730(e)(4) of the False Claims Act, must the qui tam relator, in addition to having direct and independent knowledge of such information, have made an allegation concerning the information prior to a public disclosure of the allegations by another person or entity?

7. If a person or entity makes public disclosure of allegations or transactions, must a qui tam relator who has direct and independent knowledge of the information which is the subject of such allegations or transactions be a source to the person or entity making such disclosure in order to qualify as an original source under 31 U.S.C. § 3730(e)(4) of the False Claims Act?

LIST OF ALL PARTIES TO THE PROCEEDING

The parties to this proceeding are contained in the caption of the case: James M. Hagood and the Sonoma County Water Agency.

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Petition for Writ of Certiorari

Petitioner James M. Hagood respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 15, 1996. The decision by the Court of Appeals imposed a jurisdictional bar to Petitioner's qui tam action brought pursuant to the False Claims Act, 31 U.S.C. §§3729-3733. In so doing, the court of appeals applied jurisdictional standards that were contrary to the jurisdictional tests statutorily imposed by the False Claims Act, and in conflict with jurisdictional standards decreed in decisions of other United States courts of appeal. The conflict existing between the jurisdictional rulings in the present case and those that have been promulgated by other United States courts of appeal is sharpened by the fact that there is significant, unresolved conflict

within those courts on the jurisdictional standards applied to cases brought under the False Claims Act.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported as *Hagood v. Sonoma County Water Agency,* 81 F.3d 1465 (9th Cir. 1996). It appears in the Appendix hereto at A-1.

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on April 15, 1996. Jurisdiction is conferred on the United States Supreme Court to review the judgment on a writ of certiorari by 28 U.S.C. §1254(1).

STATUTES INVOLVED

The statutory provisions involved are contained in the False Claims Act, 31 U.S.C. §§3729-3733, and the Water Supply Act of 1958, 43 U.S.C. §390b. The False Claims Act is set out in the Supplemental Appendix hereto beginning at SA-23[1] and the Water Supply Act of 1958 can be found at SA-34.[2]

STATEMENT OF THE CASE

This case is a qui tam action brought by Mr. Hagood against Sonoma County Water Agency (Sonoma) under the False Claims Act. The suit concerns Sonoma's fraudulent failure to repay the United States government for its share of the construction and

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[1] The provisions applicable to this case are those that were applicable on March 22, 1988, the date Mr. Hagood commenced this litigation. It is that version of the Act that is included in the Supplemental Appendix.

[2] The Supplemental Appendix contains the 1982 version of the Water Supply Act, the version used by the court of appeals in its decision.

operating costs of the Warm Springs Dam as required by the Water Supply Act of 1958. Petitioner's claim for fraudulent failure to repay was dismissed by the district court for lack of subject matter jurisdiction and the dismissal was upheld by the Ninth Circuit Court of Appeals. As will be explained herein, the dismissal was ordered upon the reasoning that Mr. Hagood's repayment claim was based upon the public disclosure of allegations or transactions in another proceeding and in a newspaper article. Further, the court found that Mr. Hagood did not qualify as an original source of the information so as to exempt his claim from the "public disclosure" jurisdictional bar.

Warm Springs Dam is located 65 miles north of San Francisco, California, and was built for water supply, recreation, and flood control purposes by the United States Army Corps of Engineers. The Sonoma County Water Agency served as the local sponsor of the project in anticipation of the direct economic benefits it was to receive from the enhanced water supply capacity it could deliver to its burgeoning municipal, industrial, and agricultural users. Sonoma thereby became legally obligated under the Water Supply Act to repay its equitable share of the construction and operating costs and to make those repayments at times and upon terms specifically detailed in that statute. Thus, Sonoma's statutory obligations had two principal features: a cost allocation component based upon the benefits Sonoma obtained from the overall construction project, and repayment terms designed to protect the interests of the United States treasury. The repayment terms included a "trigger" date upon which repayments were to commence (first use), strict limits upon the period of time that interest charges could be waived (first use or ten years, whichever may be shorter), and a limit on the maximum number of years for the term of the federal loan (50 years after the project is first used for the storage of water for water supply purposes).

Based upon circumstances explained hereinafter, Petitioner—during an investigation he conducted as a private citizen

following his resignation from the Corps of Engineers—obtained information that Respondent Sonoma County Water Agency was fraudulently depriving the United States of the repayments required by the Water Supply Act. Through counsel, he sent a letter on February 19, 1988, to the Attorney General of the United States stating he had documents and information demonstrating that the repayment obligation had been reduced through false statements and false records, and that there had been a total absence of repayments.

Although the letter invited the Attorney General to review Mr. Hagood's documents and information, the offer was not accepted. Accordingly, pursuant to 31 U.S.C. §3730(b), Mr. Hagood began this suit under the False Claims Act for himself and for the United States on March 22, 1988, by filing his civil complaint under seal with the United States District Court for the Northern District of California. A copy of the complaint was provided to the government in camera as is required by that statute. Jurisdiction was conferred on the United States District Court for the Northern District of California by 31 U.S.C. §§3729-3733, particularly §3730 and §3732. The United States elected not to proceed on its own behalf, and the suit continued against the Sonoma County Water Agency with Mr. Hagood, the qui tam relator, as the sole plaintiff.

In the district court proceedings, Petitioner presented two basic claims under the False Claims Act, charging Sonoma with fraudulent avoidance regarding both features of its obligations under the Water Supply Act: 1) The Cost Allocation Claim. Sonoma had presented false information to reduce its cost allocation component, a percentage allocation that should have been based upon the benefits received from the project; 2) The Repayment Claim. Sonoma had used false information and concealed other information to avoid the terms of repayment required under the Water Supply Act a) by fraudulently failing to make payments to the federal treasury in spite of the fact that the "trigger date" (first use) had occurred, and b) by attempting to

reduce and conceal its repayment obligations through the use of a fraudulently negotiated contract with the Corps of Engineers. Petitioner alleged that the contract with the Corps of Engineers was explicitly in violation of the provisions of the Water Supply Act, thereby depriving the federal treasury of principal and interest payments which Sonoma was obligated to make. As to both the cost allocation claim and the repayment claim, the violations of the False Claims Act occurred when Sonoma failed to pay upon the trigger date of "first use."[3]

On September 25, 1989, the district court dismissed Mr. Hagood's third amended complaint with prejudice for failure to state a claim upon which relief could be granted.[4] He appealed to the Ninth Circuit Court of Appeals in what was to become the first of two visits to that court.

The court of appeals ruled on April 2, 1991. *U.S. ex rel. Hagood v. Sonoma County Water Agency,* 929 F.2d 1416 (9th Cir. 1991) [*Hagood I*].[5] The court upheld Mr. Hagood's third amended complaint, reversing the district court's dismissal. *Id.* at 1422. Moreover, and particularly germane to this petition, the panel for the Ninth Circuit Court of Appeals in *Hagood I* determined that the district court had subject matter jurisdiction.

After remand, the motion practice continued. On May 11, 1995, the district court granted Sonoma's motion for summary judgment and dismissed the entire case with prejudice.[6] The court held that Mr. Hagood had not prevailed factually on the

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[3] See 31 U.S.C. §§3729(a) and 3731(b).

[4] The district court's memorandum opinion is included in the Supplemental Appendix, beginning at SA-13.

[5] The Ninth Circuit opinion is reprinted in the Supplemental Appendix beginning at SA-1.

[6] The district court's order granting defendant's motion for summary judgment is included in the Appendix commencing at A-30.

cost allocation claim. As to the repayment claim,[7] the court dismissed it for want of subject matter jurisdiction, even though the Ninth Circuit Court of Appeals had determined in 1991 that subject matter jurisdiction existed in *Hagood I.*

Mr. Hagood again appealed to the Ninth Circuit Court of Appeals. The court ruled on April 15, 1996, in favor of Sonoma, upholding the district court's dismissal with prejudice. *Hagood v. Sonoma County Water Agency,* 81 F.3d 1465 (9th Cir. 1996) [*Hagood II*].[8] The court of appeals found that subject matter jurisdiction existed for the cost allocation claim, but determined there was an absence of material issues of fact demonstrating knowing fraudulent misconduct on the part of Sonoma in regard to the establishment of its cost allocation percentage for its loans on the construction project; summary judgment on the cost allocation claim was upheld. *Id.* at 1475-1479. With respect to the repayment claim, the court found that subject matter jurisdiction was absent to support the claim. *Id.* at 1472-1475. In reaching this decision on the repayment claim, the court of appeals improperly concluded that the "allegations or transactions" contained in Mr. Hagood's claim were "based upon" their public disclosure in an "administrative hearing" and in "the news media" pursuant to 31 U.S.C. § 3730(e)(3), and that Mr. Hagood was not an "original source" under 31 U.S.C. § 3730(e)(4).

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[7] The district court, as well as the circuit court of appeals in *Hagood II,* referred to Mr. Hagood's repayment claim as the "fixed repayment schedule" claim. This is a mischaracterization. The fixed repayment schedule was part of the amended contract of October 1, 1982, between the Sonoma County Water Agency and the Corps of Engineers. As explained later in this petition, the schedule purported to establish terms of repayment that, if followed, would have violated the Water Supply Act of 1958; the Act imposed, inter alia, specific requirements for trigger dates for repayment of principal and interest, and provided the maximum length of time for repayment. The gravamen of Mr. Hagood's repayment claim, therefore, concerns the failure to make payments in accordance with the mandatory provisions of the Water Supply Act, rather then the existence of the "fixed repayment schedule" in the October 1, 1982, amended contract.

[8] This opinion is reprinted in the Appendix beginning at A-1.

The review sought by this petition is limited to the dismissal of Mr. Hagood's repayment claim, and thus focuses on the issue of subject matter jurisdiction for actions brought by qui tam relators under the False Claims Act. It does not seek review of the decision by the court of appeals upholding the summary judgment entered against the cost allocation claim.

Petitioner is an attorney. Following his graduation from law school in 1970, he was hired by the U.S. Army Corps of Engineers (Corps). He was then assigned to the office of District Counsel located in San Francisco where he remained as Assistant Counsel until April of 1982. For reasons associated with his opposition to the terms and manner of repayment being negotiated between the Corps and Sonoma for the Warm Springs Dam project, he was informed that he was being transferred out of the San Francisco office to the office located in Sacramento. When he objected to the transfer, he was terminated by the Corps of Engineers. In July of 1982, Mr. Hagood accepted an offer from the Corps office in Alaska asking him to join its staff. In September of 1985, he moved to the Sacramento office where he stayed until he resigned from the Corps in March of 1987. Currently, he has a private law practice in Denver, Colorado.

Mr. Hagood's employment background is particularly germane to the issues presented by this petition in several respects. First, Mr. Hagood was not a government employee at the time he filed his case on March 22, 1988, nor when he conducted his investigation as a private citizen. Second, after he was terminated by the Corps in April of 1982, he performed no work in any capacity as an employee of the United States on the Warm Springs Dam project. Third, while he was employed as Assistant District Counsel in the Corps' San Francisco office, his job duties were those of a lawyer providing general legal services to the Corps. He was not assigned at any time during his employment with the United States to a position as a fraud investigator, an inspector, or a quality assurance specialist. He was, instead, one

of a number of lawyers in the Office of District Counsel providing general legal services to the Corps.

Mr. Hagood became involved with the Warm Springs Dam project while at the San Francisco office. The dam was to be constructed at the junction of two streams, Dry Creek and Warm Springs Creek, tributaries that flowed south into the Russian River, the principal water source in the Russian River drainage. The Corps and Sonoma first entered into a contract concerning the construction of the dam in 1964. The dam was to provide additional storage capacity within the drainage, allowing the stored water to flow down Dry Creek and into the Russian River. Sonoma installed large intake collectors (the Mirabel and Wohler collectors) south of the confluence and at about the point where the Russian River heads west into the Pacific Ocean. The intake collectors are large mechanical devices which pump water out of the river and divert it into an elaborate distribution system that services Sonoma's water customers.

The project expanded during its planning stage. The dam was originally designed with a total capacity of 277,000 acre feet of water, with 132,000 acre feet being devoted to Sonoma's water supply.[9] But Sonoma desired more water storage capacity for its use. The capacity was eventually increased to 381,000 acre feet, 212,000 acre feet being devoted to Sonoma's water storage pool alone.

On October 9, 1981, Mr. Hagood was asked to attend a meeting with Captain Scott Mosely (the Corps' Warm Springs Dam Project Coordinator and the individual in charge of negotiating the contract with Sonoma on behalf of the Corps) and Robert Beach (Sonoma's General Manager) to discuss changes to the contract proposed by Sonoma. During the meeting, Mr. Hagood expressed concerns over the repayment provisions of Sonoma's proposals.

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[9] One acre foot is that amount of water volume obtained by flooding an acre of land to a height of one foot.

Commencing with that October 9, 1981, meeting, Mr. Hagood stated his concerns with the contractual provisions; it was a course of action that ultimately resulted in his termination with the San Francisco office. Mr. Hagood had discussions with other members of the Corps staff following the first meeting with Mosely and Beach. On November 26, 1981, he sent a Memo for Record to Captain Mosely and Colonel Bazilwich, the Corps' District Engineer and Contracting Officer, retaining a copy for his own files.[10] Less than a week later, he followed the memo with another memorandum entitled "Disposition Form," dated November 30, 1981, in which he memorialized earlier discussions with supervisory personnel at the Corps informing them that, due to his opinion that the recommended repayment terms violated the Water Supply Act of 1958, he would not participate in the preparation of the amended contract.[11] Further, on March 25, 1982, he wrote a seven page letter to Colonel Bazilwich, wherein he again enumerated his objections to the proposed amended contract, explaining that, in spite of being ordered to do so, he would not participate in drafting the amended contract provisions.[12] After sending this letter, Mr. Hagood was told he was being transferred to the Sacramento office. After he objected, he was terminated by the Corps of Engineers.

Mr. Hagood presented his objections to the new contract proposals from the time he learned of them at the October 9, 1981, meeting. As the appended memoranda and letter demonstrate, Mr. Hagood explained that the repayment terms would

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[10] The Memo for Record was part of the record below (R. 630-633) and is a part of the Supplemental Appendix to this petition, commencing at SA-37.

[11] The Disposition Form was part of the record below (R. 636-637) and is included within the Supplemental Appendix to this petition, beginning at SA-42.

[12] The Bazilwich letter was part of the record below (R. 639-645) and is part of the Supplemental Appendix, commencing at SA-44.

violate the specific and mandatory provisions of the Water Supply Act of 1958. He objected because the proposals created a deferral of interest and principal contrary to the Act. He pointed out that the Act required repayment within a fifty year term, and that the proposed repayment schedule extended well beyond that period. Mr. Hagood protested the proposals' failure to abide by the Act's mandatory trigger dates of first use, and he objected to the fixed repayment schedule dates upon any basis other than the "first use" trigger date as being illegal and a violation of the Act. He took exception to the cost allocation which lowered the percentage of overall construction cost Sonoma would have to pay. He also explained that neither the Corps nor Sonoma had discretion to violate an express law of Congress.

Sonoma and the Corps proceeded to finalize an amended contract after Mr. Hagood was terminated, and it was signed October 1, 1982. While the final contract was structured to require repayment within a fifty year term, The contract had been divided into four separate "blocks" of water. Each block was given an artificial trigger date which meant that payments for each block, including the first, were to begin on a date contrary to the date required by the Act (first use). By fictitiously "breaking" the storage into four separate blocks, and by then moving the commencement date for repayment of principal and interest to a date in the future different from, and violative of, the trigger date in the Act, Sonoma was able to achieve the interest free use of money. Despite the fact that the dam had been built, that the federal treasury had paid for the construction costs, and that Sonoma would have made use of the water and received revenue from its customers, Sonoma would not have been paying either principal or interest to the government on its loan of almost $100 million. Thus, the amended contract was contrary to the provisions of the Act in the very areas that were the subject of Mr. Hagood's course of action taken from and after October 9, 1981: the repayment terms violated the Water Supply Act; the

trigger date for the Act was breached, and interest and principal were being deferred beyond the Act's requirements.

The federal government was being set up to get bilked. Sonoma's General Manager, Robert Beach, one of the individuals who attended the October 9, 1981, meeting, reported in a memorandum to the Sonoma County Administrator that, given the repayment terms that were negotiated, the present value of the Agency's repayment obligation was only $9,220,003.64. This result was achieved even though the Warm Springs Dam cost $312,000,000.00, and that Sonoma's share—even with the reduced cost allocation—was to be $96,624,900.00. In present value dollars, then, Sonoma would be paying less than 3% of the construction costs if the legally required trigger dates were ignored by Sonoma in favor of the artificial dates it negotiated with the Corps of Engineers.

The potential for harm to the government posed by the contract ultimately materialized. After the amended contract was signed, construction of the dam was completed. Its "plant in service" date, the date after construction was complete and the dam was capable of storing water, was November 1, 1984. When Mr. Hagood resigned from the Corps of Engineers in March of 1987, he began to investigate whether, in fact, use of the water by Sonoma had commenced. He personally went to the dam and saw that the dam was fully impounded with water and that water was being discharged into Dry Creek. Lest there be any question, he took pictures of the discharge and included them with the disclosure materials presented to the government when he filed his original complaint.

Concerned that the government was being denied money it was legally owed, Mr. Hagood, as a private citizen, submitted Freedom of Information Act requests to the U.S. Army and obtained eight responses; he went to the Sonoma County Water Agency to obtain any records reflecting that Sonoma had paid the federal government for the water that was being used; there were none. He went to the California Water Resources Control

Board to review water demand studies for the dam and learned that Sonoma had obtained a permit to appropriate water from the dam in 1986. He went to the United States Geological Survey to obtain stream flow data. First use had commenced by Sonoma more than a year before, yet payments were not being made to the federal treasury. Mr. Hagood commenced this suit under the False Claims Act because the harm threatened to the treasury by the amended contract had occurred as a result of the actions taken by Sonoma in direct violation of the Water Supply Act of 1958.

REASONS FOR GRANTING THE WRIT

This Court has not reviewed the jurisdictional standards to be applied to qui tam plaintiffs in the fifty three (53) years that have elapsed since enactment of the substantial amendments made in 1943 to the False Claims Act.[13] The 1943 legislation was passed in response to the Court's ruling in *United States ex rel. Marcus v. Hess,* 317 U.S. 537 (1943). The 1943 amendments established jurisdictional barriers curtailing the ability of qui tam plaintiffs to prosecute cases under the Act. In 1986 Congress passed new legislation to strengthen the Act and expand its jurisdictional scope following Congressional hearings into reports of widespread contractor abuse and fraud.[14]

Because the court in *Hagood II* departed so significantly from the jurisdictional tests contained within the False Claims Act and those delineated by other circuit courts, Petitioner respectfully requests this Court to grant the writ. The reasons for granting the writ, however, extend beyond the parameters of

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[13] Act of Dec. 23, 1943, ch. 377, 57 Stat. 608 (codified as amended at 31 U.S.C. § 232 (1976).

[14] See *United States ex rel. S. Prawer & Co. v. Fleet Bank,* 24 F.3d 320, 324-26 (1st Cir. 1994) for a discussion of the history of amendments to the False Claims Act. *See also,* the dissenting opinion of Judge Scirica in *United States ex rel. Stinson v. Prudential Ins. Co.,* 944 F.2d 1149, 1162-68 (3rd Cir. 1991).

Mr. Hagood's case: the inter-circuit conflict is of such dimension that resolution by this Court is required to enable prospective plaintiffs and defendants alike, as well as district and appellate courts, to contend with the conflicting jurisdictional pronouncements.

The False Claims Act, as amended in 1986, contains its own jurisdictional standards. Germane to this case are those described in 31 U.S.C. § 3730(e)(4)(A) and (B). Because the False Claims Act is remedial legislation, the provisions of the statute, including the jurisdictional tests, must be construed "not technically and restrictively, but to flexibly effectuate its remedial purposes." *SEC v. Capital Gains Research Bureau,* 375 U.S. 180, 195 (1963); *United States ex rel. Marcus v. Hess,* 317 U.S. 537, 549 (1943); *United States v. Neifert-White Co.,* 390 U.S. 228, 233 (1968).

The language of § 3730(e)(4)(A) [hereinafter (4)(A)] disallows cases based upon certain publicly disclosed allegations or transactions. This preclusion, however, is inapplicable to those qui tam plaintiffs who are "an original source." The language of § 3730(e)(4)(B) [hereinafter (4)(B)] defines the term "original source." The two provisions are found at SA-30.

In *Hagood II* the Ninth Circuit panel held that the public disclosure provisions of (4)(A) were applicable to this case. It then found Mr. Hagood did not qualify as "an original source" under (4)(B) to save his repayment claim from the bar of (4)(A). In both respects the court erred.

1. ANALYSIS UNDER THE PUBLIC DISCLOSURE REQUIREMENTS OF (4)(A).

The court of appeals in *Hagood II* held that there were two occurrences that constituted public disclosures under (4)(A): a proceeding before the Federal Energy Regulatory Commission (FERC) and an article that ran in a local newspaper. Each will be examined as against the jurisdictional tests contained in (4)(A) as they have been interpreted by courts of appeal.

a) *FERC PROCEEDING.* During the construction phase of Warm Springs Dam, the City of Ukiah (Ukiah) applied to the Federal Energy Regulatory Commission for a preliminary permit to study the feasibility of operating a hydropower facility at the dam under 16 U.S.C. § 798. Ukiah is located on the Russian River in Mendocino County just below Coyote Dam and north of the Warm Springs Dam. Through its application, Ukiah was attempting to obtain the benefits of the dam's hydropower potential.

Sonoma intervened in the FERC proceedings to oppose Ukiah's application for preliminary permit, and submitted its own application. FERC issued its initial decision in favor of Sonoma. Ukiah requested a rehearing on March 12, 1982. FERC upheld its original decision and rejected Ukiah's application on January 26, 1983. Ukiah appealed FERC's final decision, and the United States Court of Appeals for the District of Columbia Circuit affirmed the FERC ruling. *City of Ukiah, Cal. v. F.E.R.C.*, 729 F.2d 793 (D.C. Cir. 1984).

During the rehearing, Ukiah presented arguments to FERC countering Sonoma's contention that it was able to direct releases of water from the dam, a contention that Sonoma said was bolstered by the proposed contractual provisions being negotiated by the Corps of Engineers. Under those draft provisions, Sonoma said it would not be required to begin paying on the contract with the Corps if the releases were for non-consumptive (hydropower) purposes, and thus there would be no economic disincentive for hydropower releases to be made.

In this fashion, then, the proposals made by Sonoma to the Corps for an amended contract for Warm Springs Dam became a topic of the FERC proceedings. In the present case, Sonoma argued that Ukiah's contentions in the FERC proceedings rose to the level of a jurisdictionally precluding (4)(A) public disclosure. Sonoma presented documents from the FERC proceedings for the district court's consideration in Mr. Hagood's case during

the summary judgment proceedings in 1995, including two letters written by Ukiah's counsel to the Corps of Engineers in July of 1982 which complained about the draft proposals then under consideration. The first letter was dated July 1, 1982; it is included in Petitioner's Supplemental Appendix commencing at SA-55. The second letter was dated July 9, 1982.

In presenting these letters to the district court below, Sonoma's counsel represented they had been first presented in the FERC proceedings by Ukiah on July 12, 1982. Based upon the record below, these letters represent the first time Ukiah's contentions concerning the draft contract proposals were introduced into the FERC proceedings, i.e. mid-July of 1982. The court of appeals in *Hagood II* quoted from these July, 1982, letters in concluding that the Ukiah letters served as a qualifying public disclosure under (4)(A) that jurisdictionally barred Mr. Hagood's repayment claim.[15]

The Ukiah letters are important to the extent they may be considered public disclosures under the provisions of (4)(A). The public disclosure conditions of the False Claim Act obtain their context from the history of the Act as it has been interpreted and amended over the past five decades. In 1943 this Court decided *United States ex rel. Marcus v. Hess,* 317 U.S. 537 (1943). The Court held that even if a qui tam relator's case was entirely dependent on the government's investigation, the Act preserved his right to sue. *Id.* at 545-48.

Congress responded to the Marcus decision with the 1943 amendments to the Act. The amendments provided, inter alia, that an individual's qui tam action would be dismissed if the government possessed any knowledge of the fraud when the suit was filed. The amendments significantly curtailed the ability of a qui tam plaintiff to maintain an action under the False Claims Act.[16] *United States ex rel. Wisconsin v. Dean,* 729 F.2d 1100, 1103

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[15] See footnote 14 in *Hagood II* at 1474.

[16] See footnote 14.

(7th Cir. 1984). Thus, Congress again responded in 1986 to correct its overreaction in 1943. The explicit purpose of the 1986 amendments was "to enhance the Government's ability to recover losses sustained as a result of fraud against the Government." S.Rep. No. 345, 99th Cong., 2d Sess., at 1, *reprinted in* 1986 U.S.C.C.A.N. at 5266. Faced with ever more sophisticated fraudulent activity, the drafters of the amendments came to the conclusion that "only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds. Accordingly, the Senate bill increases incentives, financial and otherwise, for private individuals to bring suits on behalf of the Government." *Id.* at 1-2 and 5266-67, respectively.

Contrary to the decision in *Hagood II,* other courts of appeal have ruled in a manner consonant with both the statutory language and the statutory purpose of the 1986 amendments. The First Circuit Court of Appeals issued the most comprehensive opinion on the jurisdictional standards under the 1986 amendments, focusing on the interpretation to be given the "based upon allegations or transactions which are the subject of" language contained in 31 U.S.C. § 3730(e)(3). *United States ex rel. S. Prawer & Co. v. Fleet Bank, supra.* The court in *Hagood II* was presented with a companion provision [§ 3730(e)(4)] containing substantially the same language as (e)(3), with (e)(3) referring to allegations or transactions which are the subject of another proceeding and (e)(4) referring to allegations or transactions publicly disclosed in another proceeding.[17]

The defendants in *Fleet Bank* argued that there was an identity of issues between those raised in an earlier collection

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[17] The jurisdictional standards for the False Claims Act are contained in four subsections of 31 U.S.C. § 3730(e). Hagood II involved the interpretation of the fourth subsection of § 3730(e). Fleet Bank was concerned with the third subsection which is directed to previous suits in which the United States is a party. The relevant differences in the two sections are that subsection 3 refers to actions based upon allegations or transactions which are the subject of a proceeding whereas subsection 4 refers to actions based upon the public disclosure of allegations or transactions in a proceeding.

case and those presented in the qui tam case, including alleged fraudulent misconduct on the part of Fleet and other defendants. Thus, the defendants asserted that Prawer's qui tam action was based upon allegations or transactions which were part of the collection case.

In *Fleet Bank* the court stated that when presented with a facially ambiguous statute, as it found in this case, it "would look to the statute as a whole and the history of its enactment in order to glean congressional intent." *Id.* at 327. In doing so, the court concluded that "a primary objective of the 1986 amendments . . . was to encourage and provide incentives for the bringing of *qui tam* actions in *all but* the several circumstances delineated in § 3730(e)." *Id.*

The court determined that the 1986 amendments sought to prevent those qui tam actions that could be characterized as being "parasitic." In that regard it was important to look at the two separate cases to determine whether there was a "host/parasite relationship". *Id.*[18] The test enunciated by the court in *Fleet Bank* was straightforward: to determine whether the qui tam case was receiving support, advantage, or the like from the host case without giving any useful or proper return to the government. *Id.* at 327-28. In applying that test, the court held that the qui tam case was not parasitic of the FDIC collection case for two reasons: 1) the FDIC had not proceeded against the qui tam defendants for fraud or otherwise in the collection case and, thus, a remedy for potential fraud had not been sought in the collection case; 2) the FDIC could not have proceeded against *Fleet Bank* for fraud in the collection case. *Id.* at 328. Thus, in evaluating whether a jurisdictional bar should be imposed in a qui tam action, it is important to assess whether the earlier proceeding was actually presented with the charges of fraud, and

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[18] The importance of distinguishing between parasitic and non-parasitic qui tam actions has been discussed by other courts of appeal. *See, e.g., United States ex rel. Rabushka v. Crane Co.*, 40 F.3d 1509, 1511 (8th Cir. 1994), *cert. denied*, 115 S.Ct 2579.

whether that earlier proceeding had the substantive capacity to remedy the fraudulent activity and provide a return to the United States treasury.

The Court of Appeals for the District of Columbia Circuit reviewed the requirements of § 3730(e)(4) and reached a result consistent with *Fleet Bank's* attention to the substance of the "allegations or transactions" concerning fraud. *United States ex rel. Springfield Terminal Ry. v. Quinn,* 14 F.3d 645 (D.C. Cir. 1994). The court concluded as follows: "The language employed in § 3730(e)(4)(A) suggests that Congress sought to prohibit *qui tam* actions *only* when either the allegation of fraud or the critical elements of the fraudulent transaction themselves were in the public domain." *Id.* at 654.[19]

Before examining the court's decision in *Hagood II* against the jurisdictional standards established by other courts of appeal, one additional aspect of the (4)(A) language requires examination, namely the "based upon" criterion. The statute by its terms will bar qui tam actions that are "based upon the public disclosure of allegations or transactions in a [proceeding] . . . ," unless one can be considered an original source. In interpreting this statute, the Ninth Circuit Court of Appeals has held that *each* of four elements must be present to defeat jurisdiction: public disclosure; of allegations or transactions; in a proceeding; "and *the relator's action is 'based upon' that public disclosure.*" *United States ex rel. Lindenthal v. General Dynamics Corp.,* 61 F.3d 1402, 1409 (9th Cir. 1995) [emphasis supplied]. The statute itself is quite clear in that it does not refer to the relator's qui tam suit being based upon "similar allegations or transactions publicly

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[19] A decision by the Court of Appeals for the Ninth Circuit stated that it looked to the publicly disclosed allegations to determine whether they alleged or revealed "the factual predicates of fraud". *United States ex rel. Lindenthal v. General Dynamics Corp.,* 61 F.3d 1402, 1410 (9th Cir. 1995). The Eighth Circuit Court of Appeals has described the inquiry as follows: " . . . when the essential elements comprising that fraudulent activity have been publicly disclosed so as to raise a reasonable inference of fraud." *United States ex rel. Rabushka v. Crane Co., supra,* at 1514.

disclosed in a [proceeding]." Rather the statute specifically requires that the action be "based upon the public disclosure . . . " before a bar will be imposed. Thus, it is insufficient under (4)(A) to find that there is an identity between the allegations contained in the qui tam suit and those contained in the publicly disclosed information. Instead, it is necessary to show a connection between the suit and the disclosure, thereby demonstrating that the suit was "based upon" the disclosure itself.[20]

When examined against jurisdictional standards established by other courts of appeal, the court's decision in *Hagood II* places an interpretation on the language of (4)(A) that conflicts with the more reasoned decisions of other appellate courts. Furthermore, the decision—by establishing unwarranted jurisdictional burdens on qui tam actions—is contrary to the remedial purposes sought by the 1986 amendments. The Ninth Circuit's analysis of the FERC proceeding is flawed in three respects:

First, the FERC proceeding was never presented with an allegation by Ukiah or anyone else that Sonoma had committed fraud. Neither the July 1, 1982, letter nor the July 9, 1982, letter makes such a charge. The court in *Hagood II* concluded that "Ukiah *all but accused* the Water Agency of fraud in its letters to the Corps, which it also filed with the FERC." *Id.* at 1474 [emphasis supplied]. Such a standard, however, is in conflict with the clear language of the statute which expressly requires an "allegation." It is in conflict with the pronouncement in *United States ex rel. Springfield Terminal Ry. v. Quinn, supra,* which requires the allegation or the critical elements of fraud to be

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[20] In interpreting the "based upon" requirement of (4)(A), a number of appellate courts have held that the requirement is satisfied if the qui tam case is based in any part on the publicly disclosed information. *United States ex rel. Kreindler & Kriendler v. United Technologies Corp.,* 985 F.2d 1148, 1158 (2d. Cir. 1993), *cert. denied,* 113 S.Ct 2962; *Federal Recovery Services, Inc. v. U.S.,* 72 F.3d 447, 451 (5th Cir. 1995); *United States ex rel. Precision Co. v. Koch Industries,* 971 F.2d 548, 552-3 (10th Cir. 1992), *cert. denied,* 113 S.Ct 1364 (1993); *Cooper v. Blue Cross and Blue Shield of Florida Inc.,* 19 F.3d 562, 567 (11th Cir. 1994).

presented; it is in conflict with *Fleet Bank* because the charges of fraud were never presented and, accordingly, there was no opportunity to act on the charges. Moreover, the court in *Hagood II* contradicted its own rationale later in the opinion when it stated: " . . . an issue need not be decided in prior litigation for the public disclosure bar to be triggered; rather, its mere disclosure suffices." *Id.* at 1474. Yet, in this case, no allegation of fraud was disclosed within the FERC proceeding.

Second, the FERC proceeding did not have the substantive capacity to remedy the fraudulent activity and provide a return to the United States treasury even if the allegation of fraud had been made. The matter before the Federal Energy Regulatory Commission concerned the propriety of awarding a preliminary permit to two competing applicants for a hydropower study. The regulations of the Commission imposed limits on the scope of the Commission's review, constraining it to award the permit to the first-filed applicant unless a competing applicant could demonstrate a more comprehensive water development plan. 18 C.F.R. § 4.33(g) (1983).

FERC could do no more than deny both permits, or grant one and deny the other. The Corps of Engineers was not a party to the proceeding and, thus, FERC was unable to make a ruling which would have had binding effect on the Corps. The court in *Ukiah* emphasized that fact in commenting that the Corps "has no official interest in this proceeding." *Id.* at 800. FERC could not have invalidated the contract; it could not have made a determination of fraudulent conduct and it could not have assessed a fine or civil award against Sonoma. Additionally, the FERC proceeding occurred more than a year before Sonoma actually committed the actionable misconduct under the False Claims Act when it began its diversions of water from the dam without paying the federal treasury as required by the Water Supply Act of 1958. Thus, the FERC proceeding did not constitute a substantive forum as required by *Fleet Bank*.

Finally, Mr. Hagood's qui tam action was not "based upon" the public disclosure of any matters contained in the FERC proceedings. *Lindenthal* specifically required each of the four elements under (4)(A) to be established, including that "the relator's action is 'based upon' that public disclosure." *Lindenthal, supra,* at 1409. Mr. Hagood had commenced his own investigation almost eight months before the letters had been written. He had been terminated by the Corps of Engineers for his opposition to the amended contract more than three months before the Ukiah letters were composed. The letters are pale in comparison to the statements and charges made by Mr. Hagood in the memoranda and correspondence he sent the Corps months earlier.

The court of appeals erred in finding that the FERC proceeding was a jurisdictional bar to Mr. Hagood's repayment claim under the provisions of §3730(e)(4)(A).

b) *NEWSPAPER ARTICLE.* The court of appeals in *Hagood II* also invoked (4)(A) based upon a newspaper article that was published in the Santa Rosa Press Democrat on October 3, 1982.[21] The article is best characterized as a local "booster" story congratulating people who negotiated the amended contract.

The court of appeals found that Petitioner's "claim now that the Water Agency did *in fact* begin using the water without making payments amounts to no more than a new factual assertion, which when 'fairly characterized . . . repeats what the public already knows." ' *Id.* Based on this reasoning, the court held that the requirements of (4)(A) were satisfied by the article.

Section 3730(e)(4)(A) includes public disclosures from the news media as one of the disclosures qualifying for review under (4)(A). But as with other sources of disclosure, the news media provision is incorporated within the overall subsection in context

[21] The article is included in Petitioner's Supplemental Appendix commencing at SA-60.

with the other provisions and qualifications of (4)(A). For the newspaper article to have served as a bar, therefore, it would have been necessary for the court of appeals to have found, as required by the specific language of (4)(A), that the qui tam action was "based upon the public disclosure of allegations or transactions . . . from the news media . . . "

The information contained in that article clearly did not constitute such a "disclosure." Fraud is not alleged in the article as would be required by *Fleet Bank, Lindenthal,* and *Springfield Terminal Ry.* To the contrary, the article pats people on the back, providing not the slightest hint of illegality, impropriety, or fraudulent misconduct. Likewise, there is no evidence that Mr. Hagood's qui tam case was based upon the article, nor could it have been since the qui tam action was based on allegations of fraudulent and illegal misconduct on the part of Sonoma and the article was devoted to laudatory coverage of a new and beneficial contract for the local community. See *United States ex rel. Lindenthal v. General Dynamics Corp., supra.*

The decision in *Hagood II* conflicts with the holding reached by the Eighth Circuit Court of Appeals dealing with the news media section of (4)(A). *United States ex rel. Rabushka v. Crane Co., supra.* In *Rabushka,* the court of appeals held that when evaluating whether a news article constitutes a "transaction" under (4)(A) "the bar is given effect when the essential elements comprising that fraudulent transaction have been publicly disclosed so as to raise a reasonable inference of fraud." *Id.* at 1514. In *Hagood II* the court of appeals did not subject the article in the Press Democrat to any fraud analysis, whether the test pronounced in *Rabushka* or any other similar test. In doing so, the court in *Hagood II* elevated public disclosures in the news media to a level higher than the public disclosures in other proceedings, freeing such public disclosures from the specific, limiting language Congress expressly included in (4)(A).

The court erred in finding that the newspaper article was a jurisdictional bar to Mr. Hagood's repayment claim.

2. ANALYSIS UNDER THE ORIGINAL SOURCE EXCEPTION OF (4)(B).

After holding that Mr. Hagood's repayment claim was covered by the public disclosure provisions of (4)(A), the court in *Hagood II* then found he was not "an original source" under (4)(B), a classification that exempts a qui tam suit from the jurisdictional bar. The court based its decision on three reasons.

First, the court stated that Mr. Hagood had not alleged in his memoranda and letter "that the Water Agency and the Corps had negotiated a repayment contract that allowed the Water Agency to begin using water before it began paying for it." *Id.* at 1475. Had he done so, "he would have been in a better position to bring this claim." *Id.* at 1475. The court was incorrect.

The November 26, 1981, memorandum, the November 30, 1981, memorandum, and the letter of March 25, 1982, addressed the proposed changes to the contract. The proposals established an artificial trigger date of 1993 for the commencement of payments under the contract as distinguished from 1983, the date that both the Corps and Sonoma believed first use for water storage purposes (the actual trigger date under the Water Supply Act of 1958) would commence. [22] First use for purposes of the Water Supply Act was the date the dam was first used for water storage purposes. That fact was stated on the first page of Mr. Hagood's first memorandum, and its import was emphasized by the fact that he even quoted the statutory language.

By structuring the repayment schedule with an artificial commencement date of 1993, Sonoma and the Corps were proposing an arrangement which would excuse payment during the first ten years. Thus, the schedule itself created a payment hiatus. Mr. Hagood repeatedly mentioned that the statute defined first use as the triggering date, and he quoted the statute on multiple occasions to alleviate any doubt. The documents further pointed

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[22] See, for example, the last sentence of paragraph 1a on page 6 of Mr. Hagood's March 25, 1982, letter. It is at SA-51-2.

out that such a repayment schedule—placing commencement at the artificial date of 1993 rather than 1983—would extend the ultimate payout beyond the 50 year maximum term allowed by the Water Supply Act.

The court's second rationale for finding that Mr. Hagood was not "an original source" has precedential unsoundness extending beyond the parameters of his case. Quoting from the Ninth Circuit's opinion in *Wang v. FMC Corp.*, 975 F.2d 1412, 1418 (9th Cir. 1992), the court held that a person cannot bring a qui tam action if the relator republishes an allegation that has already been publicly disclosed even if that person has direct and independent knowledge of the fraud. *Hagood II* at 1475.

The ruling, if permitted to stand, nullifies the "original source" exception to the (4)(A) jurisdictional bar. Even if we were to assume, arguendo, that Mr. Hagood's qui tam action republished allegations that had already been publicly disclosed,[23] he would still be statutorily entitled to demonstrate that he was "an original source." In doing so, his case would be immunized from the jurisdictional bar pursuant to specific Congressional enactment. The word "unless" in (4)(A) simply cannot be erased, nor can the definition of "original source" in (4)(B) as one "who has direct and independent knowledge" be viewed as statutory surplusage. Neither the court of appeals in *Hagood II* nor the court of appeals in *Wang* has the authority to ignore the statutory exception created by Congress.

The "original source" exception has been recognized by courts of appeal, and none, other than the courts in *Hagood II*

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[23] Mr. Hagood, of course, has contended that his qui tam suit is not based upon the public disclosure of allegations or transactions made in the FERC proceeding nor in the Press Democrat article, nor could it have been since neither the proceeding nor the article concerned allegations of fraud. That discussion is the subject of the (4)(A) analysis above.

and *Wang*, has promulgated a judicial rule nullifying the exception instituted by Congress.[24] In applying the "direct and independent knowledge" test, the Court of Appeals for the Seventh Circuit has looked to whether there is evidence that the qui tam relator would have learned the information absent public disclosure. *Houck on Behalf of the United States v. Folding Carton Admin.*, 881 F.2d 494, 505 (7th Cir. 1989), *cert. denied*, 494 U.S. 1025. The Court of Appeals for the Eleventh Circuit has held that a person qualifies as an original source, satisfying the direct and independent components contained in the definition, if the person had some of the information in advance of the public disclosure. *Cooper v. Blue Cross and Blue Shield of Florida, supra. See also, United States ex rel. LeBlanc v. Raytheon Co.*, 913 F.2d 17, 20 (1st Cir. 1990), *cert. denied*, 499 U.S. 921.

The third rationale used by the court in *Hagood II* in finding that Mr. Hagood was not an original source, like the second rationale, substantially undermines the remedial purposes to be achieved by the False Claims Act. The court held that Mr. Hagood could not qualify as an original source in regard to the Ukiah allegations in the FERC proceedings because he had not demonstrated he was an original source to Ukiah:

> Hagood has made no showing that Ukiah's knowledge of the repayment schedule or allegations of its illegality stemmed in any way from Hagood's internal complaints about the contract. Indeed, Hagood's internal complaints in 1981 and 1982 did not mention the fixed repayment schedule issue. Therefore, he was not an original source of this disclosure.
> — *Hagood II* at 1474

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[24] Another decision reached a result similar to that of *Hagood II* and *Wang*. The Second Circuit Court of Appeals has held that "[p]ublic disclosure of the allegations divests district courts of jurisdiction over *qui tam* suits, regardless of where the relator obtained his information." *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 324 (2d Cir. 1992).

In regard to the court's assertion that Mr. Hagood had not mentioned the fixed repayment schedule in his internal complaints, Petitioner has discussed this issue earlier in this petition. Please see the discussion in footnote 7 on page 6 of this petition, as well as the discussion concerning the proposed changes at pages 9-11 and 23-24 of this petition. The memoranda and correspondence are replete with his criticisms of the structure of the repayment provisions of the contract proposals, as well s other aspects of the repayment provisions that were illegal. It deserves emphasis again (*see* footnote 7) to mention that Mr. Hagood's repayment claim makes allegations of fraudulent misconduct on the part of Sonoma that include, but that are in no way limited to, his allegations concerning the repayment schedule. Yet, had that not been the case, and had Mr. Hagood made no complaints concerning the repayment schedule and had he made no allegations concerning any part of the repayment terms, he would still not be divested from qualifying as an original source. 31 U.S.C. § 3730(e)(4)(B) defines that phrase, and nowhere in the definition is there a requirement that the qui tam relator demonstrate that he or she made allegations prior to any allegations by any other person or entity. Instead, the statute provides that one is to be deemed an original source if such person has direct and independent knowledge of the information, and if the information is voluntarily provided the government before filing suit. Not only was the court incorrect in claiming that Mr. Hagood had not made allegations in his internal complaints concerning the fixed repayment schedule, but it also imposed a requirement that is not imposed by the statute. Congress was empowered to define the requisite qualifications for original sources. It did so in (4)(B). The Ninth Circuit Court of Appeals cannot legislate an additional qualification.

In regard to the court's assertion that Mr. Hagood was not a source of Ukiah's disclosure, here again, the court of appeals in *Hagood II* has imposed a limitation upon original source status that was not legislated by Congress. Nowhere within the provisions of (4)(B) is there a requirement that the qui tam relator be

a source to the publicly disclosing party. To the contrary, the statute specifically requires that the relator have direct and independent knowledge of the information.

The courts of appeal are in conflict on this issue, the Second Circuit holding that one must be "a source to the entity that publicly disclosed the allegations," and the Ninth Circuit holding that the relator must demonstrate that he or she "played some part, whether direct or indirect, in the public disclosure." *United States ex rel. Dick v. Long Island Lighting Co.,* 912 F.2d 13, 16 (2d Cir. 1990); *United States ex rel. Barajas v. Northrop Corp.,* 5 F.3d 407, 411 (9th Cir. 1993), *cert denied,* 114 S.Ct. 1543. This standard was explicitly rejected by the Fourth Circuit Court of Appeals, holding that § 3730(e)(4)(A) " . . . unambiguously does not require, as the Second Circuit has held that it does, that a relator be a source to the original disclosing entity in order to be an 'original source.' " *United States ex rel. Siller v. Becton Dickinson & Co..,* 21 F.3d 1339, 1351 (4th Cir. 1994), *cert. denied,* 115 S.Ct. 316.

The central requirement imposed by Congress for one to be deemed an original source is the direct and independent knowledge test. It is this test, rather than additional tests imposed by courts of appeal, that is controlling. The Court of Appeals for the Eighth Circuit summarized the direct and independent knowledge test as follows:

> . . . A relator is said to have direct knowledge of fraud when he "saw [it] with his own eyes." *Id.* The direct knowledge requirement was intended to avoid parasitic lawsuits by "disinterested outsider(s)" who "simply stumble across an interesting court file." *United States ex rel. Stinson, Lyons, Gerlin & Bustamante v. Provident Life & Accident Ins. Co.,* 721 F.Supp. 1247, 1258 (S.D.Fla. 1989) *(Provident).* Instead, the Act seeks to encourage persons with *"first-hand* knowledge of fraudulent misconduct," *Prudential,* 944 F.2d at 1154 (emphasis added), or those "who are either *close*

observers or otherwise involved in the fraudulent activity" to come forward. *U.S. Ex Rel. Barth v. Ridgedale Elec., Inc.,* 44 F.3d 699, 703 (8th Cir. 1995)

Other courts of appeal have interpreted the meaning to be given the words "direct" and "independent," thereby emphasizing the importance of the original source exception to the jurisdictional bar. The Court of Appeals for the District of Columbia Circuit, for instance, has held that direct " . . . signifies 'marked by absence of an intervening agency' . . . " and independent knowledge " . . . is knowledge that is not itself dependent on public disclosure." *United States ex rel. Springfield Terminal Ry. v. Quinn, supra,* at 656. Whereas the court in *Hagood II* effectively eliminated original source as an exception to the jurisdictional bar, arguing that Mr. Hagood was merely republishing allegations already in the public domain, the court in *Springfield Terminal Ry.* held that "direct and independent knowledge . . . refers to direct and independent knowledge of any essential element of the underlying fraud transaction." *Id.* at 657. This approach was also followed by the Fifth Circuit Court of Appeals when it determined that the qui tam relator did not qualify as an original source, but this determination was reached only after the court found that the relator had no direct and independent knowledge of any of the publicly disclosed information. *Gold v. Morrison-Knudsen Co.,* 68 F.3d 1475, 1477-78 (2d Cir. 1995). [25]

In regard to Mr. Hagood, there can be no doubt he had "direct and independent knowledge." His involvement was the first. His complaints concerning the proposed repayment terms were detailed at length in his memoranda and correspondence that followed the meeting of October 9, 1981, in which he first

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[25] The Third Circuit Court of Appeals has required that "the relator must possess substantive information about the particular fraud, rather than merely background information which enables a putative relator to understand the significance of a publicly disclosed transaction or allegation." *United States ex rel. Stinson v. Prudential Ins., supra,* at 1160.

voiced his opposition. He was, in fact, terminated after opposing the contract proposals, and had been out of work as a consequence thereof for more than three months before the letters upon which Sonoma relies were even written. His "direct and independent knowledge" extended further: upon his ultimate resignation from the Corps in the spring of 1987, he went to the dam site, personally observed the operations of the dam and the water diversions from it, and took pictures to memorialize his observations. He went to state and federal offices to obtain information about Sonoma's water usage. He went to Sonoma to find evidence of any payment, and found none. He wrote the Attorney General of the United States to inform him of his investigation and to solicit the Attorney General's own inquiry. When no action was taken, suit was filed.

It was error for the court of appeals to nullify the original source exception and to jurisdictionally bar Mr. Hagood's repayment claim.

CONCLUSION

For these reasons, Petitioner respectfully requests this Court to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in dismissing Petitioner's repayment claim.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES M. HAGOOD, *Plaintiff-Appellant,* v. SONOMA COUNTY WATER AGENCY, *Defendant-Appellee.*	No. 95-16092 D.C. No. CV-88-00991-CW OPINION

Appeal from the United States District Court
for the Northern District of California
Claudia Wilken, District Judge, Presiding

Argued and Submitted
February 15, 1996—San Francisco, California

Filed April 15, 1996

Before: Procter Hug, Jr., Chief Judge, Joseph T. Sneed and
Andrew J. Kleinfeld, Circuit Judges.

Opinion by Judge Sneed;
Concurrence by Judge Kleinfeld

OPINION

SNEED, Circuit Judge:

This is an appeal by qui tam plaintiff James M. Hagood from the district court's grant of summary judgment in favor of the Sonoma County Water Agency in his action under the False Claims Act, 31 U.S.C. §§ 3729-3733.[1] Hagood's action has its source in the construction of the Warm Springs Dam on Dry Creek, a tributary of the Russian River in northern California, and a 1982 amended contract by which the Sonoma County Water Agency ("the Water Agency") agreed to repay the United States for the water supply component of the cost of building the dam. Thus, Hagood's action is a "reverse false claim": he alleges not that the Water Agency fraudulently overbilled the United States, but that it fraudulently induced the United States to underbill it. Hagood contends on appeal that the district court erred by (1) finding that it lacked subject matter jurisdiction over his claim concerning the fixed repayment schedule; and (2) granting summary judgment in favor of the Water Agency on his cost allocation claim. The Water Agency submits that the district court lacked subject matter jurisdiction over both claims.

This is Hagood's second trip to this court. On his first trip, we held that his complaint stated a claim under the False Claims Act, and reversed the district court's 12(b)(6) dismissal. *United States ex rel. Hagood v. Sonoma County Water Agency,* 929 F.2d

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[1] The False Claims Act provides for the recovery of civil penalties from those who knowingly present a false or fraudulent claim to the federal government for payment, or knowingly use a false record to avoid or decrease an obligation to pay the federal government. 31 U.S.C. § 3729(a)(1),(7). The Act's qui tam provisions allow an individual to bring a civil action on behalf of himself as well as the government, and to share in any penalty recovered. *Id.* § 3730(b),(d). The Act was first enacted in 1863 "in order to combat rampant fraud in Civil War defense contracts." S. Rep. No. 345, 99th Cong., 2d Sess. 8 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5273. It was substantially amended and strengthened in 1986 because of rising government fraud, especially in the areas of defense contracting and health care benefits. *Id.* at 2-4, 1986 U.S.C.C.A.N. at 5267-69.

1416 (9th Cir. 1991). This time, with more evidence in hand, we hold him to the higher standard required to survive summary judgment.

The district court had jurisdiction under 31 U.S.C. §§ 3729-3733, unless the claims were barred under 31 U.S.C. § 3730(e)(4), a disputed issue on appeal. We have jurisdiction pursuant to 28 U.S.C. § 1291. We now affirm the grant of summary judgment.

I.

BACKGROUND OF HAGOOD'S CLAIMS

It all began when Congress authorized construction of the Warm Springs Dam by the United States Army Corps of Engineers ("the Corps") in the Flood Control Act of 1962, Pub.L. 87-874, 76 Stat. 1180. The project's authorized purposes were flood control, recreation, and water supply. To the latter purpose a storage capacity of 132,000 acre-feet[2] was allocated. Under the Water Supply Act of 1958, 43 U.S.C. §390b, the local interests who benefit from the water supply component of federal projects, such as Warm Springs, are to shoulder the portion of construction costs allocated to that purpose.[3] Costs allocated to federal purposes like flood control and recreation are to be borne by the federal government. The local sponsor for the Warm Springs project was the Sonoma County Flood Control & Water Conservation District, later renamed the Sonoma County Water Agency.

Accordingly, in 1964 the Water Agency signed a contract with the Corps to use and repay the cost of water supply storage

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[2] An acre-foot is the volume of water that covers an area of one acre to a depth of one foot, about 43,560 cubic feet. *The American Heritage Dictionary* (3d ed. 1992).

[3] The Water Supply Act, before it was amended in 1986 by Pub.L. 99-662, Tit. IX, § 932(a), 100 Stat. 4196, stated in relevant part:

(footnote continues)

created by the Warm Springs Dam and its reservoir, Lake Sonoma. The contract defined three 44,000 acre-foot blocks of water storage space, use and repayment of which was to begin in 1979, 1985, and 1991, respectively. In the contract, the Corps allocated to water supply storage 30% of the total construction cost, or $12,433,500.

The Expanded Warm Springs Project

In 1967, before significant construction had begun, the Corps prepared a General Design Memorandum ("GDM") which envisioned an expanded Warm Springs Dam project with a water supply storage capacity of 212,000 acre-feet, an increase of 80,000 acre-feet. In the GDM, the Corps reevaluated the breakdown of costs and adjusted the cost allocation for water supply storage downward to 27.76%. Despite the lower allocation, a higher price tag of $20 million was assigned to water supply

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(footnote continued)

> In carrying out the policy set forth in this section, it is hereby provided that storage may be included in any reservoir project surveyed, planned, constructed or to be planned, surveyed and/or constructed by the Corps of Engineers or the Bureau of Reclamation to impound water for present or anticipated future demand or need for municipal or industrial water . . . : *Provided,* That the cost of any construction or modification authorized under the provisions of this section shall be determined on the basis that all authorized purposes served by the project shall share equitably in the benefits of multiple purpose construction, as determined by the Secretary of the Army or the Secretary of the Interior, as the case may be: *Provided further,* That before construction or modification of any project including water supply provisions for present demand is initiated, State or local interests shall agree to pay for the cost of such provisions in accordance with the provisions of this section: *And provided further,* That not to exceed 30 per centum of the total estimated cost of any project may be allocated to anticipated future demands where State or local interests give reasonable assurances, and there is reasonable evidence, that such demands for the use of such storage will be made within a period of time which will permit paying out the costs allocated to water supply within the life of the project[.]

43 U.S.C. § 390b(b). The water supply component of Warm Springs was entirely for future supply.

storage because of the project's expansion and rising construction costs.[4] The Corps asked for the Water Agency's assurances that it needed and would pay for the additional storage, and the Water Agency agreed. In 1969, the Corps approved the project "optimization" and reported it to Congress.

The Cost Allocation Question

In early 1974, while the dam was still under construction, the U.S. General Accounting Office conducted an inquiry into the Warm Springs project and concluded that delays in project completion called into question the validity of the cost allocation.[5] In response, the Corps acknowledged that delays and the increased storage space in the expanded project made a new cost allocation necessary, but explained that this would be performed when firm cost figures became available, "about four years from now." However, in a letter to the Water Agency later in 1974, the chief of the Corps' Engineering Division in San Francisco, H. E. Pape, Jr., wrote that "[t]he percentage of cost allocated to the water supply feature is 27.76% as established in the approved General Design Memorandum. This percentage will remain

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[4] This figure continued to grow as total costs grew, so that the cost finally estimated for water supply in the 1982 amended contract was $96,624,900.

[5] The GAO's regional manager, A. M. Clavelli. wrote to the Corps' district engineer in San Francisco, Col. James L. Lammie:

> Early in the project formulation during the 1960's, it was assumed the municipal and industrial water supply benefits would not be derived until about 10 years after the expected project completion in about 1970. Therefore, the benefits assigned to water supply were discounted at the project interest rate (3-1/8 percent) for a 10-year period. This in turn reduced the percentage and amount of project costs allocated to water supply: the only reimbursable project purpose.
>
> With the delays experienced, it now appears the initial use of water specified for in the contract will coincide with project completion at about the year 1980. In our opinion, the changed situation makes questionable the continued use of the premise upon which cost allocation was based.
>
> We believe you should consider reallocation of project costs based upon the current situation.

unchanged regardless of any changes made in the project's first [i.e. construction] cost."

The confusion over the cost allocation resurfaced several years later, when the Water Agency and the Corps began negotiating an amended contract to reflect the project's expansion. The primary negotiators were Robert F. Beach, General Manager of the Water Agency since 1980, and Capt. Scott Mosely of the Corps' San Francisco district. In April 1981, Capt. Mosely sought guidance from Corps headquarters on how to proceed in view of the project's expansion. In response, L. H. Blakey, Chief of the Planning Division at Corps headquarters, noted that "[a] new cost allocation is required," but that "[t]he above guidance cannot be taken as official Office, Chief of Engineers views."

Apparently, Mosely and Beach then agreed that Beach would submit a draft of the proposed amended contract, which Beach did on October 1, 1981. The draft included the 27.76% allocation and a handwritten figure of $122,018,700 for the cost allocated to water supply. In a cover letter, Beach pointed out that he had "included a cost estimate which you may wish to modify."

Mosely and Beach then met to discuss the draft in November 1981. Also at that meeting was appellant Hagood, who was an Assistant District Counsel in the Corps' San Francisco district and had been assigned the task of drafting the new contract. According to Hagood, he and Mosely went into the meeting with questions about the figures Beach had included in the draft. Beach responded by showing them the Pape letter:

> At that time, Mr. Beach pulled out a letter from Mr. Pape . . . Mr. Beach explained that the figures, the percentage figure that he was using in his contract, proposed contract, was the same figure that Henry Pape had sent to Mr. Beach's predecessor, Mr. Miller.

Mosely and Hagood, who had been unaware of this letter, told Beach they would "look into this."

When the two returned to San Francisco after the meeting, Hagood asked the engineering branch about the cost allocation. He was told by an assistant chief of engineering in the San Francisco district that a cost allocation would not be done for the enlarged project. Greatly concerned, Hagood wrote two file memos in November 1981, and a letter to the District Engineer, Colonel Paul Bazilwich, Jr., on March 25, 1981, opining that the Water Supply Act required "a new allocation based on accurate and current costs."[6] Hagood refused to participate in drafting the contract. According to Hagood,

> if a current and accurate cost allocation was performed, [the Water Agency's] repayment obligation would increase at least $60 million over its cost allocation based on the inaccurate 1967 GDM. Thus [the Water Agency's] cost share may be over $145 million rather than the approximately $86 million based on the 27% total repayment obligation.

Steve Lingenfelter, who was then District Counsel for the San Francisco District, wrote a memo to the file disputing Hagood's interpretation of the Water Supply Act and arguing:

> Colonel Bazilwich considered all staff comments regarding the cost allocation issue. It was ultimately his decision, after a thorough review and evaluation of all aspects of that issue, that preparation of a new cost allocation was not mandatory.

In April 1982, Hagood left the San Francisco District for Alaska; in 1987, he retired from the Corps.

The cost allocation controversy continued to percolate within the Corps, however. On September 13, 1982, James P. Oppenheim, Assistant Director of Civil Works, Pacific, wrote to the Commander of the Pacific Division that

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[6] Hagood also challenged the draft contract on other grounds that he does not pursue in this action. His second claim in this action, that the contract fails to tie commencement of repayment to the Water Agency's first use of the project, was not raised in his 1981 and 1982 correspondence.

> In accordance with paragraph 2-5b of ER 1105-2-40 [an internal Corps regulation], dated 8 January 1982, an updated preliminary cost allocation study is required. This cost allocation must be approved before an accompanying water storage contract can be submitted to the Secretary of the Army for approval . . . . Corps policy on this item . . . is to adjust contract costs to only reflect actual construction costs and not to reflect change in cost allocations.

On September 27, 1982, Edward M. Lee, Jr., who had replaced Colonel Bazilwich as District Engineer, wrote to the Commander of the South Pacific Division that "the cost allocation set forth in Table II of Exhibit 'A' to the executed contract is the current updated project cost allocation based upon the project and the authorized project purposes."

Finally, on September 30, 1982, the contract was forwarded for final Corps approval to Assistant Secretary of the Army William Gianelli, accompanied by a memo from Brigadier General Forrest T. Gay, III, who noted:

> Regulations require an updated preliminary cost allocation as a basis for this cost-sharing contract. The expedited schedule for review and approval of this contract directed by your office did not allow time for this new cost allocation to be developed.

Despite this observation, Gay recommended Gianelli sign the contract. On a "routing and transmittal slip" attached to the contract and memo, a handwritten note stated:

> Corps *policy* requires a preliminary cost allocation schedule to be prepared before contract is signed. This is not a legal necessity. It will take 3-6 months to develop a new schedule. Decision made by OCE [Office of Chief Engineer] staff to waive policy.

On October 1, Gianelli signed the contract.

The Fixed Repayment Schedule Question

While enlargement of the dam raised cost allocation issues, the possibility of conjunctively operating Lake Sonoma and another dam and reservoir upstream of Warm Springs raised repayment timing issues.[7] Coyote Dam and Lake Mendocino are located on the east fork of the Russian River above the confluence of Dry Creek with the river. Because the two facilities are part of the same river system, operating them conjunctively would, according to Water Agency correspondence on the issue, help "to maintain minimum flows in the Russian River and Dry Creek and to optimize beneficial uses of water for water supply, fish, wildlife and other purposes." Such conjunctive management would involve making some releases from Lake Sonoma that would ordinarily be made from Lake Mendocino, in order to maintain higher water levels in the latter.

In 1978, before negotiations on the amended contract began, the Water Agency and the California Department of Fish & Game ("Fish & Game") began exploring this possibility. Concerned that releasing water from Lake Sonoma under this scheme would prematurely trigger repayment on its Warm Springs Dam obligations, Gordon W. Miller, Beach's predecessor at the Water Agency, asked the Corps for its opinion. In response, John M. Adsit, then District Engineer in San Francisco, acknowledged the Water Agency's concern, and offered to circumvent the problem by performing a monthly "routing" of the river system. The idea behind the routing methodology was

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[7] The timing of repayments on the Water Agency's obligation was significant because of a provision of the Water Supply Act that stated:

> [T]he entire amount of the construction costs, including interest during construction, allocated to water supply shall be repaid within the life of the project but in no event to exceed fifty years after the project is first used for the storage of water for water supply purposes, except that (1) no payment need be made with respect to storage for future water supply *until such supply is first used* . . . .

43 U.S.C. § 390b(b) (emphasis added).

that repayment on the Warm Springs obligation would be triggered only when the "routing" showed that had the releases from Lake Sonoma been made instead from Lake Mendocino, the available water supply in Lake Mendocino would have been exhausted.[8] The parties agreed on the need for conjunctive management, but the routing methodology was soon abandoned as too complex. Yet, its introduction influenced the course of negotiations over the repayment terms in the new contract.

When the Water Agency and the Corps began negotiating the new contract in August 1980, the draft contract added a fourth block of 80,000 acre-feet to the three blocks in the original contract. Fixing the dates on which repayment for each block would begin was a major sticking point. This was because conjunctive operation of Lakes Sonoma and Mendocino made it difficult to determine when, absent conjunctive operation, actual first use of each block of water in Lake Sonoma would occur. The solution settled upon was to adopt fixed repayment start dates for each block which were, in turn, based on "triggering studies" prepared by the Water Agency to predict hypothetical dates of first use.[9] Thus, the repayment schedule, set forth in the

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[8] Adsit's letter stated in pertinent part:

> To see if existing supplies of water [in the Russian River] are adequate, the Corps will perform a monthly water supply routing of the Russian River system, assuming that Lake Sonoma was not in existence, at the end of every calendar year. When the routing indicates that Lake Mendocino would have been drawn down below the bottom of the water supply pool at the end of any month, [the Water Agency] will be directed to commence full repayment of costs associated with the first, or subsequent blocks of water from Lake Sonoma (as set forth in existing contracts).

[9] One of the Corps' lawyers proposed that repayment on a given block could begin earlier than the fixed date if an earlier actual first use were later determined. The Water Agency protested that given the complexity of determining when "first use" occurred, this solution too might inadvertently trigger repayment obligations. As an alternative, the Water Agency proposed to include a savings clause, to which the Corps' attorneys agreed. That clause in the final contract reads:

(footnote continues)

margin,[10] called for payments for the four blocks to commence in 1992, 1995, 2000, and 2005, respectively, regardless of when first use of each block actually began. The total water supply storage cost, including interest, of $96,624,900 was to be repaid by the year 2042, 50 years from the anticipated "plant-in-service" date of 1992.

Whether the adoption of fixed repayment start dates complied with the terms of the Water Supply Act was soon disputed both within the Corps and without. In 1980, while the contract negotiations were proceeding, the Water Agency had become involved in a dispute with the City of Ukiah ("Ukiah") over their competing applications to the Federal Energy Regulatory Commission ("FERC") for a preliminary permit to investigate the development of hydropower facilities at Warm Springs Dam. The FERC granted the permit to the Water Agency on the basis of its contract with the Corps, which allowed it to control releases from the Warm Springs Dam. Ukiah then submitted a petition for rehearing which alleged that the fixed repayment schedule in the proposed amended contract violated the Water Supply Act

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(footnote continued)

> The Government further reserves the right . . . to prohibit any withdrawals of water from the lake, or any releases through the outlet works that would cause the repayment provisions of this contract to be inconsistent with any provision of the Water Supply Act of 1958.

[10]

Date repayment begins	Block of water supply storage	Amount of repayment
1992	Block 1 (44,000 AF)	$16,831,889 (principal) $ 3,222,336 (interest)
1995	Block 2 (44,000 AF)	$16,831,889 (principal) $ 3,222,336 (interest)
2000	Block 3 (44,000 AF)	$16,831,889 (principal) $ 3,222,336 (interest)
2005	Block 4 (80,000 AF)	$31,603,434 (principal) $ 5,858,791 (interest)
Totals	212,000 AF	$96,624,900

because it decoupled commencement of repayment from actual first use of the water. This petition was denied and Ukiah then filed a petition for review in the D.C. Circuit Court of Appeals. In *City of Ukiah v. F.E.R.C.*, 729 F.2d 793, 799 (D.C. Cir. 1984), the D.C. Circuit held that "section 390b(b)(1) [of the Water Supply Act] does not require Sonoma to begin paying for its storage space when it releases water for nonconsumptive purposes, including power generation." The court declined to reach the question whether the same was true for consumptive purposes, including water supply. *Id.* at 797 n.12. The court noted, however, that Ukiah had argued both: "Ukiah also argues that the 1982 contract is illegal under the Water Supply Act because the contract separates Sonoma's repayment obligation from its use of water even for water supply purposes." *Id.*

Internal Corps memoranda from that time indicate confusion over precisely what the Water Supply Act required. The San Francisco district argued that the fixed repayment schedule was legal.[11] The legal office of the Corps headquarters apparently had questions about the schedule's legality up to the end. However, the addition of the savings clause around September 13 appeared to satisfy those concerns.[12] On October 1, Gianelli signed the contract.

The Role of Political Pressure

One final wrinkle in this tale must be told in order to understand Hagood's claims. In March 1982, Beach contacted the office of his representative, Congressman Claussen, to request help in shepherding the contract through the Corps' approval process. Beach was put in touch with Paul Reisinger,

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[11] A July 12, 1982, memo from Edward M. Lee, Jr., District Engineer, states:

> Provided the statute's 50 year requirement is met, the District is of the opinion that the 1958 Act does not preclude the establishment of definitive contractural [sic] repayment dates which may not necessarily correspond to the actual dates of demand.

[12] Memo from Gary R. Lord, Deputy Commander, South Pacific Division, Sept. 13, 1982; Memo from Brigadier General Gay, Sept. 30, 1982.

special counsel to the minority for the Public Works & Transportation Subcommittee of the House Appropriations Committee. Following contacts between Beach and Reisinger, and Reisinger and Gianelli's staff, an internal Corps decision was made to expedite the contract.

On September 9, 1982, Gianelli issued a memo ordering that the contract be expedited for his approval, and on October 1, 1982, he signed the contract.

II.

PRIOR PROCEEDINGS

Hagood, following his retirement from the Corps, filed this qui tam action on March 22, 1988, originally naming as defendants two Corps officials as well as the Water Agency. After the district court dismissed the individual defendants, and Hagood filed his third amended complaint, the district court dismissed the case for failure to state a claim. This court reversed and remanded, holding that the complaint stated a claim under the False Claims Act. *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416 (9th Cir. 1991) ("*Hagood I*"). After a period of discovery, the Water Agency moved for summary judgment. The district court granted the motion, and Hagood timely appealed.

III.

JURISDICTION UNDER THE FALSE CLAIMS ACT

[1] We review de novo the lower court's jurisdictional determination. *Hoeck v. City of Portland*, 57 F.3d 781, 784 (9th Cir. 1995), *cert. denied*, ____ U.S. ____, 116 S.Ct. 910 (1996). However, we accept the factual findings underlying such determination unless they are clearly erroneous. *United States ex rel. Barajas v. Northrop Corp.*, 5. F.3d 407, 409 n.5 (9th Cir. 1993), *cert. denied*, ____ U.S. ____, 114 S.Ct. 1543, 128 L.Ed.2d 195 (1994). Hagood bears the burden of establishing jurisdiction, and all other essential elements of his claim, by a preponderance of the evidence. 31 U.S.C. § 3731(c); *Barajas,* 5 F.3d at 409 n.5.

A. *The Fixed Repayment Schedule Claim*

The district court declined to reach the merits of Hagood's claim that the fixed repayment schedule in the 1982 contract amounted to a false claim. The court held that its exercise of jurisdiction over his claim was barred by the public disclosure provision of the False Claims Act. According to that provision:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless . . . the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. § 3730(e)(4). The district court held that this provision deprived it of jurisdiction over Hagood's fixed repayment schedule claim because "it is undisputed that the allegation that a fixed repayment schedule violated the Water Supply Act was publicly disclosed in the administrative proceedings and litigation brought by Ukiah."

Hagood primarily contends that the district court erred in its public disclosure determination because (1) Ukiah did not actually allege fraud as he does; (2) there was no actual fraud on the government until the Water Agency began using the storage space without initiating repayments, which did not occur until after the Ukiah litigation was over; and (3) he was the first to allege improper political pressure in aid of the false claim.

[2] Before turning to these contentions, we must dispose of Hagood's secondary contention, which is based on the law of the case. Hagood argues that the law of the case prohibited the district court from questioning its jurisdiction, as this court had already ruled in favor of jurisdiction in *Hagood I*. This contention lacks merit. The previous panel addressed only the cost allocation claim, never the fixed repayment claim: "According to the allegations of the complaint, the Water Agency 'used pressure and influence' to expedite [the contract's] signing without accurate and current cost allocations." *Hagood I*, 929 F.2d at 1418. Indeed, Hagood's fixed repayment schedule claim was not clearly stated even in his third amended complaint. That claim began to take precise shape only on remand, in his opposition to the Water Agency's summary judgment motion before us now.

In addition, there is now, at the summary judgment stage, significant new evidence bearing on the jurisdiction issue that was not before the previous panel on the 12(b)(6) motion to dismiss. The new evidence, discussed below, warranted reconsideration of the question by the district court on remand. *Eichman v. Fotomat Corp.*, 880 F.2d 149, 157 (9th Cir. 1989).

1. *Allegations of Fraud.*

This court has held that to raise the jurisdictional bar, the public disclosure must be of "allegations or transactions," as opposed to mere information. *Wang v. FMC Corp.*, 975 F.2d 1412, 1418 (9th Cir. 1992). The *Wang* court found there was public disclosure where the qui tam suit was "supported by a few factual assertions never before publicly disclosed; but 'fairly characterized' the allegation repeats what the public already knows." *Id.* at 1417; *see also United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 654 (D.C. Cir. 1994) ("Congress sought to prohibit *qui tam* actions *only* when either the allegation of fraud or the critical elements of the fraudulent transaction themselves were in the public domain."). Thus, the jurisdictional bar may be raised by public disclosure unaccompanied by an explicit allegation of fraud.

[3] In this case, there was public disclosure during the Ukiah proceedings of allegations that the fixed repayment schedule violated the Water Supply Act.[13] In the course of the FERC proceedings, Ukiah learned of the proposed amended contract between the Water Agency and the Corps, and argued that it would improperly allow the Water Agency to withdraw water without initiating the repayment obligation under the Water Supply Act. Indeed, Ukiah all but accused the Water Agency of fraud in its letters to the Corps, which it also filed with the FERC.[14]

[4] When Ukiah lost in the FERC proceedings, it submitted a petition for review in the D.C. Circuit Court of Appeals. Although the controlling issue was whether the Act required initiation of repayment on first use of the water for hydropower generation, a nonconsumptive purpose, rather than for water supply, a consumptive purpose, Ukiah based its argument on both. *See City of Ukiah,* 729 F.2d at 797 n.12 ("Ukiah also argues that the 1982 contract is illegal under the Water Supply Act because the contract separates Sonoma's repayment obligation from its use of water even for water supply purposes."). An issue need not be decided in prior litigation for the public disclosure

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[13] That documents filed with an agency or court during administrative proceedings or civil litigation are considered publicly disclosed is a firmly established principle. *See United States v. Northrop Corp.*, 59 F.3d 953, 966 (9th Cir. 1995) (" 'every court of appeal to have addressed the question' has held that 'any information disclosed through civil litigation and on file with the clerk's office should be considered a public disclosure of allegations in a civil hearing of [sic] the purposes of section 3730(e)(4)(a)' ") (quoting *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1350 (4th Cir.), *cert. denied*, _____U.S._____, 115 S.Ct. 316 130 L.Ed.2d 278 (1994)).

[14] The record contains, for example, these complaints by Ukiah: "Ukiah also protests Sonoma's attempt to avoid its repayment obligation under the Water Supply Act of 1958, 43 U.S.C. 390b." And again: "Sonoma's intent in negotiating a revised contract is clearly to receive the benefit of the water stored at Warm Springs without paying for it in accordance with the express directive of the Congress."

bar to be triggered; rather, its mere disclosure suffices. *See Northrop Corp.*, 59 F.3d at 966.

[5] Nor has Hagood shown that he is an "original source" of Ukiah's allegations. *See Hagood I*, 929 F.2d at 1420 (original source inquiry triggered only upon finding of public disclosure). To be an original source, one must (1) have direct and independent knowledge of information on which the allegations are based; and (2) have voluntarily provided the information to the government before filing the action. 31 U.S.C. § 3730(e)(4)(B); *United States ex rel. Fine v. Chevron, U.S.A., Inc.*, 72 F.3d 740, 743 (9th Cir. 1995) (en banc), *petition for cert. filed*, 64 U.S.L.W. 3642 (U.S. Mar. 11, 1996) (No. 95-1445). In other words, " 'one must have had a hand in the public disclosure of allegations that are a part of one's suit.' " *Barajas*, 5 F.3d at 410 (quoting *Wang*, 975 F.2d at 1418). Hagood has made no showing that Ukiah's knowledge of the repayment schedule or allegations of its illegality stemmed in any way from Hagood's internal complaints about the contract. Indeed, Hagood's internal complaints in 1981 and 1982 did not mention the fixed repayment schedule issue. Therefore, he was not an original source of this disclosure.

2. *Fraud Based on Actual Use.*

[6] Hagood, in an attempt to narrow the focus of his claim, contends that the district court's jurisdictional ruling cannot apply to his claim that the Water Agency's fraud began only when it actually used water "because the relevant facts as to the actual water usage without repayment did not occur until after the project had been placed in operation."[15]

Obviously the Water Agency's actual use of water from Lake Sonoma in 1987 or 1988 could not have been disclosed

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[15] Hagood's claim concerning actual use of the water did not emerge until he filed a brief opposing the Water Agency's motion for summary judgment. However, the district court was correct in reaching the claim, in effect treating it as a request to amend the pleadings. *United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1524 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3593 (U.S. Feb. 15, 1996) (No. 95-1340).

during the Ukiah proceedings in 1982. However, documents filed in those proceedings acknowledged that the Water Agency would be able to do so:

> As to the County having the ability to release water prior to the contractually designated demand dates for the various blocks, and not be obligated to commence repayment for such releases until the contractually designated dates, the District agrees that such a situation could occur under the proposed amended contract. It could also occur that the "Water Agency" will begin repayment for one or more of the blocks of storage *before* demand is actually made for such storage. However, the District contends neither such occurrence would be in violation of the 1958 Water Supply Act.[16]

An October 3, 1982, article in the Santa Rosa *Press Democrat* also publicly reported the Water Agency's announcement that "the new plan will allow the county to use as much water as it needs as soon as Lake Sonoma is filled, without triggering a higher payment schedule that was called for under the old agreement."

Thus, the public was alerted in 1982 that the new contract embraced the possibility that the Water Agency might begin using water from the Warm Springs project before commencing repayment. Hagood's claim now that the Water Agency did *in fact* begin using the water without making payments amounts to no more than a new factual assertion, which when " 'fairly characterized' . . . repeats what the public already knows." *Wang*, 975 F.2d at 1417.

Hagood seeks to negate the effect of the contract by arguing that the Water Agency cannot rely on it to escape its obligation to begin repayments when it first uses the water. In this he is wrong. As the district court correctly observed, "unless the contract itself constitutes a false claim, Defendant may properly rely

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[16] Memo from Edward M. Lee, Jr., San Francisco District, to Commander, South Pacific Division, Aug. 16, 1982.

upon it." Short of offering evidence that the Water Agency's use of the water violated its contract with the Corps,[17] Hagood cannot base jurisdiction on this claim, which "rests on the same foundation as Plaintiff's other repayment claims."

3. *Improper Political Pressure.*

[7] Hagood contends that he is the first to allege that the Water Agency procured the favorable repayment contract through improper political pressure. This is true. However, ordinary political pressure, without more, is not a wrong. To the extent it is more, it rests, like the actual use claim, on the same foundation as does his claim that the fixed repayment schedule violates the Water Supply Act. With that claim barred by section 3730(e)(4), Hagood's allegations concerning improper political pressure are also barred.

4. *Conclusion.*

Hagood is not a whistleblower with respect to his fixed repayment claim. Through the Ukiah litigation and media reports, the public was made aware in 1982 that the Water Agency and the Corps had negotiated a repayment contract that allowed the Water Agency to begin using water before it began paying for it. Had Hagood raised this issue in his 1981 and 1982 memoranda before he left the Corps, he would have been in a better position to bring this claim. However, he did not. As we stated in *Wang:*

> If, however, someone *republishes* an allegation that already has been publicly disclosed, he cannot bring a

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[17] At oral argument, Hagood did indeed seem to argue that the Water Agency was improperly using water from Lake Sonoma for consumptive purposes and hiding this use from the Corps. There is no evidence to support this contention. There is evidence that the contract allows the Water Agency to use water for consumptive purposes, and that it is the Corps which controls the gates that release water from the reservoir. For example, Beach stated in a declaration: "The procedure for making these releases was to request a release from Corps personnel who would then make any releases from the dam."

> *qui tam* suit, even if he had "direct and independent knowledge" of the fraud. He is no "whistleblower." A "whistleblower" sounds the alarm; he does not echo it.

Wang, 975 F.2d at 1419 (citing S. Rep. 345 at 6, *reprinted in* 1986 U.S.C.C.A.N. at 5271).

B. *The Cost Allocation Claim*

Hagood fares better as a "whistleblower" with respect to the issue of the cost allocation. The Corps memoranda which the Water Agency filed with the FERC during the Ukiah proceedings revealed the debate within the Corps over the cost allocation issue. Those filings may be enough to constitute public disclosure of the cost allocation issue.

[8] However, even if they were, Hagood was an original source of the allegation.[18] Hagood's complaint about the cost allocation began as early as November 1981, while Ukiah's letters were not filed in the FERC proceedings until July 1982. Moreover, as a Corps attorney he had worked a great deal on the Warm Springs Dam project and was in a position to know its specifications and costs. Because he learned of information relevant to the issue independently of its public disclosure, the first prong of the original source test, direct and independent knowledge, is met. *See Wang*, 975 F.2d at 1417.

He also meets the second prong of the original source test, as he voluntarily provided his superiors in the Corps with an explanation of why he thought a new cost allocation was legally

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[18] The original source test is often treated as the focus of the jurisdictional inquiry, with courts treating the "based upon public disclosure" step as a " 'quick trigger to get to the more exacting original source inquiry.' " *Cooper v. Blue Cross & Blue Shield of Florida, Inc.*, 19 F.3d 562, 568 n.10 (11th Cir. 1994) (quoting *United States ex rel. Precision Co. v. Koch Indus.*, 971 F.2d 548, 552 (10th Cir. 1992), *cert. denied*, 507 U.S. 951, 113 S.Ct 1364, 122 L.Ed.2d 742 (1993)).

required.[19] Although Hagood was not the only Corps employee to argue that a new allocation was needed, "[a]nyone who helped to report the allegation to either the government or the media would have 'indirectly' helped to publicly disclose it." *Wang,* 975 F.2d at 1419. Therefore, disclosure was at least partially based on records resulting from Hagood's complaints, and the district court correctly held that he was an original source. The jurisdictional bar of section 3730(e)(4) did not preclude this claim. Thus, we must address the issue whether what Hagood now reveals was knowing fraudulent behavior directed at the United States by the Water Agency.

IV.

SCOPE OF THE FALSE CLAIMS ACT

We review de novo the grant of summary judgment on the cost allocation claim. *Jesinger v. Nevada Fed. Credit Union,* 24 F.3d 1127, 1130 (9th Cir. 1994). We approach this issue mindful

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[19] This case is not controlled by our recent decision in *Fine,* 72 F.3d at 741, in which we held that an internal government auditor whose job was to expose fraud did not "voluntarily" provide information for the purpose of qualifying as an original source. Hagood's job was not to expose fraud, but to draft contracts and perform other legal services for the Corps. We acknowledged in *Fine* that the question "whether federal employees might be excluded as a class from qualifying as original sources" remained "for another day." *Id.* at 744 n.5; *see also United States ex rel. Williams v. NEC Corp.,* 931 F.2d 1493, 1501 (11th Cir. 1991) ("nothing in [section 3730(e)(4)(A)] operates to preclude *every* government employee from bringing a *qui tam* action based upon information acquired in the course of his government employment").

of the principles governing the granting of summary judgment, which are set forth in the margin. [20]

The gist of Hagood's cost allocation claim is that

> [The Water Agency] decided to seek the influence of others to avoid current cost allocation . . . . These events set into place by [the Water Agency] resulted in violation of 31 U.S.C. § 3729(a)(6) and § 3729(a)(7) . . . In this case, [the Water Agency] had a critical role in inducing the Army Corps to rely on information which [the Water Agency] had reason to know was false.

According to the named provisions of the False Claims Act,

> Any person who—
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> . . .
>
> (6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government . . . who lawfully may not sell or pledge the property; or
>
> (7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government;
>
> is liable to the United States Government . . . .

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[20] Summary judgment is appropriate if, viewing the evidence in the light most favorable to the non-moving party, there is no genuine issue of material fact. Once the movant has made this initial showing, the burden shifts to the other party to present sufficient evidence on which a reasonable jury could find for him, on each element of the claim on which he will bear the burden of proof at trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23, 106 S.Ct 2548, 2552-53, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 252, 106 S.Ct 2505, 2512, 91 L.Ed.2d 202 (1986); *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n,* 809 F.2d 626, 630-32 (9th Cir. 1987).

31 U.S.C. §§ 3729(a)(6)-(7). Thus, a violation of the False Claims Act requires scienter.[21]

A. *Falsity of the Cost Allocation.*

[10] To support an inference of falsity, Hagood observes that the cost allocation in the 1982 contract is based on the same source data as the cost allocation in the 1964 contract despite the expansion and change in design. He also argues that the original allocation was based on a 10-year deferral of water supply benefits and thus a 10-year discounting, whereas the new contract contains at most an 8-year deferral; therefore the percentage of costs allocated to water supply should now be higher.

The evidence concerning the shortened deferral period consists entirely of the 1974 exchange of correspondence between A. M. Clavelli of the General Accounting Office and Col. Lammie of the Corps. [22] These do support an inference that the cost allocation was no longer accurate.

The evidence supporting his expansion and change-of-design argument consists of several Corps memoranda, particularly the one from Brigadier General Gay to Assistant Secretary Gianelli, accompanying the final contract:

> The cost allocation for this project was approved in November 1969. At that time, the benefit breakout was 42% flood control, 27% water conservation, and 31% recreation. The FY 83 justification statement indicates this benefit breakout to the authorized purposes is currently 55% to flood control, 34% to water supply and 11% to general recreation and fish and wildlife.

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[21] "For a *qui tam* action to survive summary judgment, the relator must produce sufficient evidence to support an inference of knowing fraud." *United States ex rel. Anderson v. Northern Telecom, Inc.*, 52 F.3d 810, 815 (9th Cir. 1995), *cert. denied*, ____U.S.____, 116 S. Ct. 700, 133 L.Ed.2d 657 (1996).

[22] See supra note 5.

This observation supports an inference that the cost allocation in the amended contract was no longer current. However, General Gay went on to recommend approval, and an accompanying note explained that the update was required by Corps policy, which was being waived. Thus, Hagood's evidence supports an inference that the allocation was imprecise, but not that it was false.

The language of the Water Supply Act concerning allocation of costs among project purposes provides the relevant government officials with fairly wide discretion:

> [T]he cost of any construction or modification authorized under the provisions of this section shall be determined on the basis that all authorized purposes served by the project shall share *equitably* in the benefits of multiple purpose construction, *as determined by the Secretary of the Army* or the Secretary of the Interior, as the case may be . . . [B]efore construction or modification of any project including water supply provisions for present demand is initiated, State or local interests shall agree to pay for the cost of such provisions . . . [23]

43 U.S.C. § 390b(b) (emphasis added).

How precise and how current the cost allocation needed to be in light of the statute's imprecise and discretionary language was a disputed question within the Corps. Even viewing Hagood's evidence in the most favorable light, that evidence shows only a disputed legal issue; that is not enough to support a reasonable inference that the allocation was *false* within the meaning of the False Claims Act.

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[23] Neither the Corps nor the Bureau of Reclamation has promulgated regulations interpreting this statute. Rather, the Corps developed internal guidelines to inform its own decisionmaking.

B. *Knowledge of Falsity.*

[11] Nor does his evidence meet the scienter requirement of the Act. To establish the type of scienter so required, a relator must show:

> that a person, with respect to information—
>
> (1) has actual knowledge of the information;
>
> (2) acts in deliberate ignorance of the truth or falsity of the information; or
>
> (3) acts in reckless disregard of the truth or falsity of the information,
>
> and no proof of specific intent to defraud is required.

31 U.S.C. § 3729(b); *see also Wang,* 975 F.2d at 1420; *Hagood I,* 929 F.2d at 1421 ("The requisite intent is the knowing presentation of what is known to be false."). No such showing has been made. As this court held in Hagood's prior appeal, "[t]o take advantage of a disputed legal question, as may have happened here, is to be neither deliberately ignorant nor recklessly disregardful." *Hagood I,* 929 F.2d at 1421.

Nor has Hagood presently shown any reason to depart from this view. He argues that Beach, the Water Agency's general manager, was sophisticated enough to know that the altered project required an updated cost allocation. In support, he submits a December 14, 1982, memo from Beach to the Sonoma County Administrator discussing a cost-sharing proposal between the federal government and the Water Agency related to recreation facilities at Lake Sonoma. In that memo, Beach stated:

> The cost allocation for the project was made in 1967 pursuant to 43 U.S. 390(b) [sic]. The removal of recreation facilities from the federal project would require a reallocation based on current project costs which could result in a substantial increase in the Agency's repayment obligation . . . . This is on top of any increases

> which would result from a reallocation based on actual costs rather than 1967 estimates of cost.

This statement indicates that Beach knew that removing an entire project purpose from the existing cost-sharing contract might require a cost reallocation, and may support a reasonable inference that Beach was sophisticated. However, to jump from there to the conclusion that Beach knew that the cost allocation in the 1982 contract was false is a leap the evidence does not support.

Nor does Hagood's other evidence in the record supply the required knowledge. In the 1974 Pape letter, the Water Agency was told *by the Corps* that no new allocation would be performed. The deposition testimony by Beach's predecessor, Gordon W. Miller, also does not establish the required knowledge. Asked whether he would expect the allocation to change after the project was "optimized," Miller replied, "Not necessarily . . . . It would depend on how [the Corps] applied the Water Supply Act of 1958 to it . . . . [I]t could be subject to change. I do not recall that it was ever changed." Miller explained: "The allocation of costs was determined by the Corps, and if I asked somebody to do an analysis, I would have him use the cost percentages as allocated by the Corps." We can now say, as we could not on the basis of the complaint alone, "that the Water Agency did merely what the Corps bid it do." *Hagood I*, 929 F.2d at 1421. Clearly, Hagood's evidence does not support a reasonable inference that the Water Agency caused the Corps to rely on such information as was before it to make the decisions it made.

[12, 13] The False Claims Act, to repeat, requires a showing of knowing fraud. " 'The requisite intent is the knowing presentation of what is known to be false,' as opposed to innocent mistake or mere negligence. 'Bad math is no fraud,' proof of mistakes 'is not evidence that one is a cheat,' and 'the common failings of engineers and other scientists are not culpable under the Act.' The statutory phrase 'known to be false' 'does not mean "scientifically untrue"; it means "a lie" ' " *Anderson*, 52 F.3d at 815-16 (citations omitted). Likewise, the statutory phrase

"known to be false" does not mean incorrect as a matter of proper accounting methods, it means a lie.

Hagood's evidence does not suggest that the Water Agency lied; it suggests only that the Water Agency knew that *the Corps'* responsibility with regard to allocating costs was not clear, and that the Corps might exercise its authority in a number of ways. At most, Hagood has shown that the Water Agency took advantage of a disputed legal issue. This, as we have previously held, is not enough.

C. *Improper Political Pressure.*

[14] Hagood again refers to political pressure as part of his cost allocation claim. He offers evidence that Beach asked Congressman Claussen for help in getting the contract approved; that after Claussen's assistant met with Corps officials, those officials decided to expedite contract approval; and that because of the expedition, there was no time to prepare a new cost allocation.[24] This chain of events supports a reasonable inference that the Water Agency used political pressure to obtain the contract's approval. It does not establish that the contract so approved was a false claim. Perhaps Congressman Claussen did

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[24] As the district court observed, the only tangible evidence indicating that the Water Agency may have objected to the preparation of a new allocation was a memo written by a Corps official stating that locals would not support the project if their share of the cost increased. The district court ruled this was likely hearsay; that funding was not an abuse of discretion. *See Larez v. City of Los Angeles*, 946 F.2d 630, 641 (9th Cir. 1991) (hearsay ruling reviewed for abuse of discretion). The Water Agency, for its part, submitted a declaration by Beach stating:

> I have never expressed any opposition to the preparation of a new cost allocation for the 1982 water supply contract between [the Water Agency] and the United States of America . . . . I have never had any discussions with anyone connected with Congressman Claussen's office, Mr. Gianelli, Mr. Dawson, Colonel Bauchspies, or Neil Saling concerning the issue of a new cost allocation . . . . I never told anyone connected with Congressman Claussen's office, nor anyone connected with the Corps, that the [Water] Agency had a deadline for execution of the final contract.

influence the manner in which the Corps officials exercised their discretion. Perhaps not. In either event, there was no false claim within the meaning of the False Claims Act, 31 U.S.C. §§ 3729-3733.

To vest executive branch officials in a democratic government with discretion in the exercise of their powers is to invite the representatives in the legislative branch of those to be affected by its exercise to present vigorously their constituents' views to such officials. To expect it to be otherwise is foolish; to require it to be otherwise would be tyranny.

IV.

CONCLUSION

Hagood has presented persuasive evidence that the Corps, in its management of the Warm Springs Dam project, may have been wasteful, or too eager to build the dam, or been given too much discretion by the statutes governing its operations. He has not, however, established a violation of the False Claims Act by the Sonoma County Water Agency.

The judgment of the district court, including its award of costs to the Water Agency, is AFFIRMED.

KLEINFELD, Circuit Judge, concurring:

I concur in the result, and in the majority's reason, that what Hagood revealed was not fraud.

We err, I think, in deciding that Hagood was an original source who voluntarily provided the information. He was a lawyer charged with the duty of drafting a contract and other documents for the transactions at issue. If he thought the transaction was fraudulent, he was "required to give an honest opinion" to his client, and "may not knowingly assist a client in criminal or fraudulent conduct." Model Rules of Professional Conduct Rule 1.2 cmt. 6 (1995). *See also* Rules of Professional Conduct of the State Bar of Cal. Rule 3-210 (1995) (stating that "[a] member shall not advise the violation of any law . . . unless the member

believes in good faith that such law . . . is invalid"). These professional obligations made disclosure to his agency of fraud mandatory, not voluntary. Therefore, *United States ex rel. Fine v. Chevron, U.S.A., Inc.*, 72 F.3d 740, 741 (9th Cir. 1995)(en banc), controls, and prevents qui tam recovery.

In *Fine*, we held that an internal government auditor whose job was to expose fraud did not "voluntarily" provide information. *Id.* at 743-44. The majority states that our decision is not controlled by *Fine* because we rejected Fine's argument that since *all* federal employees labor under a duty to report fraud against the government, treating his disclosure as involuntary would "bar all federal employees from the universe of potential original sources." *Id.* at 744. In *Fine*, we said that the question "whether federal employees might be excluded as a class from qualifying as original sources" remained "for another day." *Id.* at 744 n.5.

The issue here is distinct from whether a government lawyer who discovers a fraud in a matter unrelated to his own duties can recover in a qui tam action. Had Hagood heard from a carpool acquaintance about a fraud in some other agency, then the question we left for another day in *Fine* would be before us. But a lawyer working on a transaction has a duty as an agent to disclose to his principal "information relevant to matters within his province and of which he should know the principal would want to know." Warren A. Seavey, *Law of Agency* § 143 (1964). Because Hagood provided the information to his agency pursuant to his legal duty, he did not do so "voluntarily," as 31 U.S.C. § 3730(e)(4)(B) requires for qui tam jurisdiction. Hagood "no more voluntarily provided information to the government than we, as federal judges, voluntarily hear arguments and draft dispositions." *Fine*, 72 F.3d at 743-44.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA ex rel. JAMES M. HAGOOD, *Plaintiff,* v. SONOMA COUNTY WATER AGENCY, *Defendant.*	No. C-88-0991 CW ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

In this False Claims Act action, Plaintiff James M. Hagood sues the Sonoma County Water Agency for the benefit of the United States. He alleges that the contract between Defendant and the Army Corps of Engineers establishing payments due from Defendant for the construction of the Warm Springs Dam constitutes a false claim for two reasons. First, the payment schedule contained in the contract allegedly violates federal law by failing to require that payments begin upon Defendant's first use of the Dam. Second, Plaintiff alleges that the amount of the cost allocated to Defendant is too low and was based on information known by Defendant to be false.

Defendant's motion for summary judgment was heard by this Court on March 3, 1995. Having considered all the papers filed and arguments made by the parties, and good cause appearing, the Court hereby GRANTS the motion for the reasons stated below.

A. *Statement of Undisputed Facts and Procedural History*

This qui tam action concerns the Warm Springs Dam, authorized by the Flood Control Act of 1962. The dam was intended to serve the multiple purposes of water supply storage,

flood control and recreation. It was originally planned to have a total storage capacity of 277,000 acre feet (AF).

In 1964, Defendant Sonoma County Water Authority (SCWA), then the "Sonoma County Flood Control and Water Conservation District," entered into a water supply contract with the Army Corps of Engineers (Corps) for use of the water supply storage component of the Warm Springs Dam. In that contract, SCWA agreed to repay that portion of the costs of building the dam which was allocated to water supply storage by the Corps, which was then set at approximately 30% of the total costs. The contract divided the water supply component of the reservoir into three separate storage blocks, with SCWA's repayment obligation starting in 1979, 1985 and 1991, respectively, for the three blocks. The estimated cost to be repaid by SCWA was $12,433,500.

In 1967, the Corps decided to increase the total storage capacity of the reservoir. The Corps informed SCWA that the share of costs allocated to SCWA was reduced to approximately 25% and estimated that SCWA's allocated cost would be increased to approximately $20 million. SCWA agreed that increased storage was desirable. The Board of Directors of the SCWA wrote the Corps that:

> At such time as cost figures can be firmed up, a formal resolution authorizing the District to enter into an amended contract under provisions of the Water Supply Act of 1958 will be considered by the Board to guarantee repayment of financing of the added water supply storage, with the understanding that such additional yield would be a fourth block of water under the contract.

The Corps reported the enlargement to Congress.

On October 17, 1974, the Corps provided SCWA with a revised estimate of SCWA's share of cost of the project of

approximately $160 million.[1] On October 24, 1974, H.E. Pape, the Chief of the Engineering Division of the San Francisco District of the Corps (District), wrote SCWA informing it that the percentage of costs allocated to the water supply function of the project would be 27.75% of the total cost. The letter stated that "this percentage will remain unchanged regardless of any changes made in the project's first cost."

In 1978, the Corps, SCWA and the California Department of Fish and Game met and discussed conjunctive operation of the Coyote Valley Dam (also known as Lake Mendocino) and the Warm Springs Dam (also known as Lake Sonoma) to maintain minimum flows into the Russian River. SCWA prepared a draft operational agreement for such conjunctive operation. The Corps reviewed the draft agreement and notified SCWA that it would be directed to begin making repayment on the Warm Springs Dam contract:

> when it is shown that SCWA's existing sources of water from the Russian River, including that stored in Lake Mendocino, are inadequate to provide for all legal beneficial uses along the Russian River . . . or when the time limits specified in the contract are reached. To see if existing supplies of water are adequate, the Corps will perform a monthly water supply routing of the Russian River system, assuming that Lake Sonoma was not in existence, at the end of every calendar year. When the routing indicates that Lake Mendocino would have been drawn down below the bottom of the water supply pool at the end of any month, SCWA will be directed to commence full repayment . . . .

A description of a proposed methodology for the water supply routing was attached.

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[1] This substantial increase was due in part to delays and in part to changes in design required by seismic considerations.

On October 1, 1980, Robert F. Beach, General Manager of SCWA, proposed to the Corps by letter that this or a similar methodology for determining the date of "first use" triggering commencement of the repayment obligation be included in an amended contract which would include the increased storage space not covered by the original 1964 agreement. On November 5, 1980, Beach met with Captain Scott Mosely and other members of the District to discuss an amended contract. Following that meeting, Beach wrote to Colonel Bazilwich, District Engineer, proposing "first use" language. The letter stated that the language was intended to "make it clear that the coordinated operation of the Coyote Valley and Warm Springs Dam projects . . . would not result in the premature triggering" of SCWA's repayment obligation. This draft language was not adopted.

In 1981, Mosely sought guidance from the Office of the Chief of Engineers (OCE) regarding the new contract. On May 22, 1981, the OCE sent an advice letter stating that a new cost allocation would be required in light of the increase in capacity. The letter further advised that although an amended contract covering all four blocks of storage was desirable to the government, a new contract for the original three blocks of storage probably could not be imposed on SCWA, in which case a supplemental contract for the fourth block of storage would be needed; in either event, each block of storage was entitled to a 50-year payout period. The letter specified that it did not constitute "official Office, Chief of Engineers, views."

It appears that no final agreement as to methodology of determining "first use" was ever reached. Apparently as an alternative, SCWA prepared studies to determine "estimated first use" dates and provided the study results to Corps hydrologists in September, 1981. The study results were incorporated into a proposed amended contract prepared by SCWA. The draft contract based repayment on the 27.76% cost allocation specified by the Corps in the 1974 Pape letter, and provided separate 50-year repayment schedules for each of the four blocks of storage.

On October 9, 1981, Beach met with Mosely and Plaintiff Hagood, who was then an assistant district counsel to the District and was assigned to the renegotiation of the Warm Springs Dam Water Supply contract with SCWA. Hagood or Mosely questioned the 27.76% cost allocation, and Beach cited the 1974 Pape letter. Following that meeting, Hagood discussed the cost allocation with the District's assistant chief of engineering and was "told, in no uncertain terms, that a cost allocation would not be done for the enlarged project" because of the commitment made by the 1974 Pape letter.

Plaintiff came to the conclusion that using the cost allocation stated in the 1974 Pape letter for the new contract would not comply with the 1958 Water Supply Act, 43 U.S.C. § 390b. Plaintiff so informed his supervisor, Colonel Bazilwich. Colonel Bazilwich decided to proceed with the cost allocations as proposed, and ordered Plaintiff to prepare the contract over Plaintiff's objections. On March 25, 1982, Plaintiff put this objection, and two others, into writing in a letter addressed to Colonel Bazilwich with copies to various other officers of the Corps.[2]

While the contract negotiations were proceeding, the City of Ukiah and SCWA submitted competing applications to the Federal Energy Regulatory Commission (FERC) to operate power plants at the Warm Springs Dam. SCWA argued that it would better be able to optimize power generation because it would have a contract with the Corps allowing it to make releases from the dam. Ukiah's attorneys contacted the Corps, expressing the opinion that such control over releases would accelerate SCWA's utilization and repayment obligation. The Corps agreed to allow Ukiah's attorneys to review and comment upon any draft contract. On February 10, 1982, FERC granted SCWA's application over Ukiah's.

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[2] Plaintiff also thought that a repayment term beyond 50 years after the project was put into operation and deferred payment of interest violated the Act.

On March 31, 1982, Colonel Bazilwich forwarded to the Corps' Chief of Engineers at the Engineering Division of the San Francisco District a proposed amended contract. The proposed contract explicitly provided that repayment would start on specified "expected usage start dates" rather than upon the actual first use and was accompanied by a statement of "Deviations and Justifications" which specifically set out that this was a deviation from the Corps' standard water supply contract format.

On April 5, 1982, the Corps' District Counsel prepared a memorandum for the files, disputing Plaintiff's legal opinion and expressing as the official opinion of that office that the proposed contract complied with the Water Supply Act. It noted that there were "valid arguments" on both sides of the issue of whether a new cost allocation was required, and stated that a provision had accordingly been added to the contract that if it were subsequently determined that a new cost allocation was required, it would be performed at a later date. This memorandum was also forwarded to the Engineering Division.

Sometime later during the month of April, Plaintiff left the District. He had no further involvement in these contract negotiations.

On May 28, 1982, the Engineering Division forwarded the proposed contract to the Corps headquarters. In the meantime, SCWA had asked Congressman Clausen to facilitate processing of the contract. Congressman Clausen in turn asked Bill Reisinger, Special Counsel to the Minority Public Works and Transportation Subcommittee of the House Appropriations Committee, to assist. Reisinger in turn contacted the Director of Civil Works at Corps headquarters requesting that the contract be moved forward expeditiously if appropriate.

In response to the inquiry as to whether moving the contract quickly was appropriate, the Corps' "Assistant Director of Civil Works, Pacific" stated in a memorandum that it was appropriate to move quickly, as the Corps had proceeded with construction without having consummated a contract. The

memorandum further recommended against requiring a new cost allocation, which would take six months, stating "if it comes out different, locals will not support."

On July 1 and July 9, 1982, Ukiah's attorneys wrote the Chief Engineer, objecting to the proposed contract on the grounds that it violated the Water Supply Act by having fixed repayment dates rather than "first use" triggering of repayment. Ukiah filed both letters with the FERC.

On August 16, 1982, the San Francisco District took the position that the fixed repayment dates would not violate the Water Supply Act, whether repayment started before or after actual "first use." The Engineering Division then took the position that the District had adequately responded to the issues raised by Ukiah and recommended approval of the draft contract.

In September 7, 1982, an attorney in the Corps' Office of Chief Counsel recommended that the District be required to explain why the date of "first use" could not be ascertained. He further suggested that the repayment provision be modified to provide for earlier repayment if a "first use" date earlier than specified in the contract was determined. This suggestion was endorsed by the OCE.

On or about September 8, 1982, SCWA manager Beach met with Corps headquarters personnel. He also met with House special counsel Reisinger, who asked for a short justification of the contract.

On September 9, 1982, the Assistant Secretary of the Army directed a memorandum to the Acting Director of Civil Works at Corps headquarters stating that it was "imperative" that the processing of the contract be completed by September 15, 1982, so that the contract would be ready for signing by local authorities soon thereafter. On September 15, 1982, Beach wrote to the District Counsel stating that because the "first use" methodology was both complex and likely to change, it could not be defined in the contract; it therefore was not feasible to revise the

repayment article of the agreement to provide that repayment would begin prior to the dates stated therein if a "first use" was determined. He recommended instead that the agreement be revised to add language reserving to the Corps the right "to prohibit any withdrawals of water . . . that would cause the repayment provisions of this contract to be inconsistent with any provisions of the Water Supply Act of 1958."

This proposed "savings clause" was accepted by the District and the Division. Brigadier General Gay presented the contract to the Assistant Secretary of the Army for signature, expressing the opinion that the Corps' regulations required an updated cost allocation, but stating that an "expedited schedule for review and approval" of the contract did not allow time for a new cost allocation. The proposed contract and General Gay's report were circulated at headquarters with a note stating that Corps "policy" required a cost allocation, but that it was "not a legal necessity" and that OCE staff had decided to "waive" the policy. The contract was signed without a new cost allocation on October 1, 1982.

Ukiah then requested rehearing before FERC, arguing that any releases from the blocks of storage before the fixed repayment dates would violate the Water Supply Act. Ukiah did not argue or attempt to show that the contract was procured through improper methods or based upon any false information. The application was denied, and Ukiah filed a petition for review in the United States Court of Appeals for the District of Columbia. That court held that the SCWA could direct releases for nonconsumptive uses without triggering repayment obligations under the Water Supply Act. *City of Ukiah v. FERC*, 729 F.2d 793 (D.C. Cir. 1984). The court's opinion expressly referred to the contractual provision for fixed repayment dates "regardless of when consumptive use begins." The fixed repayment schedule was also publicly disclosed on December 3, 1982 in *The Press Democrat.*

In March, 1988, following his retirement from the Corps, Plaintiff commenced the instant litigation. This Court dismissed Plaintiff's third amended complaint for failure to state a cause of

action on the grounds that no fraud could have been committed because the government officials had full knowledge of the facts which allegedly made the cost allocations in the contract false. The Ninth Circuit reversed, finding the complaint to be sufficient. *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416 (9th Cir. 1991).

The Ninth Circuit found in the complaint, reading it "generously," an allegation that the SCWA "played an active part in having presented for signature a contract that the Water Agency knew was based on false information." *Id.* at 1421. The fact that the government officials knew of the alleged falsity is not in itself a defense. *Id.* Rather, the controlling issue is whether Defendant knew of a falsity.

The court emphasized that for Plaintiff to prevail at trial, he would have to prove that the SCWA actually knew that the information was false, or had "deliberate ignorance" of or "reckless disregard" for the true facts. The court expressly held that "to take advantage of a disputed legal question, as may have happened here, is to be neither deliberately ignorant nor recklessly disregardful." *Id.*

The Ninth Circuit also permitted the United States to file a brief *amicus curiae* to raise an issue not raised or decided below. The United States argued that this Court lacked subject matter jurisdiction under 31 U.S.C. § 3730(e)(4), which provides in relevant part as follows:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a . . . civil, or administrative hearing, in a . . . administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless . . . the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based

> and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

The government argued that Plaintiff was engaged in an administrative investigation while renegotiating the contract, and that he disclosed to himself as a member of the public the information on which he based his suit. The Ninth Circuit rejected this argument as "tortured" and "too metaphysical," and held that no "public disclosure" was made by Plaintiff to himself. *Id.* at 1419. Accordingly, there was no need for Plaintiff to show that he was the original source. *Id.* at 1420.

B. *Legal Standard*

Summary judgment is properly granted when no genuine and disputed issues of material fact remain, or when, viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986); *Eisenberg v. Insurance Co. of North America,* 815 F.2d 1285, 1288-89 (9th Cir. 1987). The moving party bears the burden of showing that there is no material factual dispute by demonstrating that there is an absence of essential evidence to support the opposing party's case. *Celotex,* 477 U.S. at 317.

The opposing party must show that there is evidence on which the jury could reasonably find in its favor. *Anderson v. Liberty Lobby Inc.,* 477 U.S. 242 (1986). The Court must regard as true the opposing party's evidence, if supported by affidavits or other evidentiary material. *Celotex,* 477 U.S at 324; *Eisenberg,* 815 F.2d at 1289. The Court must draw all reasonable inferences in favor of the party against whom summary judgment is sought. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986); *Intel Corp. v. Hartford Acc. & Indem. Co.,* 952 F.2d 1551, 1558 (9th Cir. 1991).

Material facts which would preclude entry of summary judgment are those which, under applicable substantive law, may affect the outcome of the case. The substantive law will identify

which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248.

C. *Discussion*

1. *Subject Matter Jurisdiction*

This action is based upon two allegedly unlawful aspects of the contract between Defendant SCWA and the Corps, the cost allocation and the repayment schedule. If there was public disclosure of the relevant facts prior to the filing of this suit as to either of these claims, this Court lacks subject matter jurisdiction over the claim unless Plaintiff was an "original source" of that information. 31 U.S.C. § 3730 (e)(4).

Whether Plaintiff was an original source for such a public disclosure was not decided in *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d at 1419. The only subject matter jurisdiction issue decided there was whether Plaintiff's knowledge regarding the cost allocation should be deemed a public disclosure by his governmental self to his private self; the Court held it should not. In this motion, Defendant contends that it is undisputed there was actual public disclosure within the meaning of 31 U.S.C. § 3730(e)(4). Analysis of this contention requires examination of Plaintiff's precise allegations in this action.

With respect to the repayment schedule, Plaintiff alleges that SCWA "improperly used political pressure and influence to have the Contract signed, even though the SCWA knew that the Contract . . . contained a repayment schedule that was contrary to the requirements of the [Water Supply Act]," and that SCWA "knowingly started using water from the Warm Springs Dam for water supply without commencing repayment and . . . has been using the Contract, based on false information to . . . avoid its repayment obligation to the Government." Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant's Motion for Summary Judgment (Opposition), p. 11, l. 6-13. The knowledge of falsity alleged here is knowledge that the repayment schedule was violative of the Water Supply Act.

Putting aside the question of whether the violation of a statute constitutes "falsity," it is undisputed that the allegation that a fixed repayment schedule violated the Water Supply Act was publicly disclosed in the administrative proceedings and litigation brought by Ukiah. Ukiah's request for rehearing before the FERC expressly claimed that any releases from the blocks of storage before the fixed repayment dates would violate the "first use" repayment requirements of the Water Supply Act. The Court of Appeals for the District of Columbia specifically referred to the contractual provision for fixed repayment dates "regardless of when consumptive use begins" in its opinion. In addition, the fixed repayment schedule was further disclosed by the press.

Plaintiff does not claim that he was the original source of the allegation that the fixed repayment schedule violated the Water Supply Act, nor does the record contain any support for such a claim. Instead, Plaintiff argues that there was not full disclosure of the transaction which forms the basis for his claim because Ukiah did not allege that there had been fraud. However, a disclosure is sufficient to bar subsequent *qui tam* actions when the allegedly fraudulent transaction itself is disclosed, regardless of whether there is an actual allegation of fraud. *E.g., Wang v. FMC Corp.,* 975 F.2d 1412 (9th Cir. 1992) (public disclosure of transmission problems in Bradley vehicles sold to the government constituted disclosure of claim that the government contractor defrauded the government through selling defective vehicles).

Plaintiff further argues that Ukiah did not allege that the contract was procured through improper political pressure.[3] However, the claim that Defendant used improper political methods to promote the contract does not constitute an allegation of a false claim; rather a false claim allegation must be based upon the actual falsity of the contract itself or the basis for the

[3] As discussed below, the Court finds that Plaintiff has not proffered sufficient evidence of such improper political pressure and influence to create a triable issue.

contract. Evidence of improper political methods to procure the contract would be relevant only to support an inference that Defendant had knowledge of the falsity of the contract or its basis. The issue of whether or not Defendant had knowledge of an alleged falsity is not reached where, as here, the alleged falsity has already been publicly disclosed, and Plaintiff was not an original source of that disclosure.

Plaintiff finally argues that there has been no previous disclosure of the allegation that SCWA knowingly began using water from the dam in 1988 without commencing repayment, thereby using the contract to avoid its repayment obligations under the Water Supply Act. This is apparently the first time that even Plaintiff has raised this allegation. Assuming that this belatedly raised allegation is properly before the Court, it necessarily rests on the same foundation as Plaintiff's other repayment claims, that the contract is a false claim because it violates the "first use" repayment requirement of the Water Supply Act, for unless the contract itself constitutes a false claim, Defendant may properly rely upon it. Because the allegation that the contract constitutes a false claim is statutorily barred, however, it cannot serve as the basis for this secondary claim.[4]

Therefore, the Court lacks subject matter jurisdiction over Plaintiff's claim with respect to the repayment schedule. Summary judgment is granted to Defendant on that claim.[5] However, the Court finds that it does have subject matter jurisdiction over Plaintiff's claim with respect to the cost allocation.

---

[4] The Court notes, in any event, that Plaintiff has made no showing that SCWA knowingly caused releases for consumptive purposes in 1988. Thus, even if this alleged fact were material, Plaintiff has failed to provide evidence to support it.

[5] The Court declines to impose sanctions on Defendant for failing to raise this jurisdictional issue previously. This issue of fixed repayment dates was not originally part of Plaintiff's claims. Further, Defendant claims that full document production by Plaintiff was not completed until August, 1994.

The only previous disclosure of the cost allocation aspect of the contract shown by Defendant is a disclosure by the Corps to Ukiah of records demonstrating that no new cost allocation had been performed. Assuming that this would constitute public disclosure, Defendant has not shown as a matter of law that Plaintiff is not an original source of the disclosure.

The information disclosed to Ukiah was based upon records generated as a result of Plaintiff's disclosure of the cost allocation issue to his supervisors and other Corps officials in the course of the contract negotiation and approval process. Further, the fact that the Corps persisted in its decision not to perform a new cost allocation after Plaintiff's personal involvement ended does not obliterate Plaintiff's direct and independent knowledge of the transaction. Therefore, the merits of the cost allocation claim must be reached.

2. *Cost Allocation Claim*

At trial, it would be Plaintiff's burden to prove that the cost allocation was based on false information and that Defendant SCWA knew of the falsity, or acted in deliberate ignorance or with reckless disregard of the truth or falsity of the information. *Wang*, 975 F.2d at 1420. Accordingly, to defeat summary judgment, Plaintiff must come forward with sufficient evidence to allow a finder of fact to find in his favor on these issues. *Id.* This he has not done.

Plaintiff misunderstands the burden of proof. He argues that "SCWA has not presented any evidence . . . that the cost allocation was true and correct." Opposition, p. 19, l. 7-9. However, it is Plaintiff who must make a showing that the cost allocation was false and that Defendant knew of the falsity.

It is undisputed that calculation of the cost allocation was the duty of the Corps and was in fact performed by the Corps. Plaintiff's argument that Defendant must have known that the cost allocation was false is based upon the premise that it must

have been inaccurate because it was based upon outdated information. However, no such necessary knowledge of falsity is shown.

The original allocation was altered after the 1967 decision to expand the dam's capacity was made. The 1974 Pape letter informing Defendant of the 27.6% allocation came seven years after the decision to expand the dam's capacity. Plaintiff can point to no reason why Defendant must have known that the allocation, modified after the plans for expansion were made, did not take the expansion into account, as Plaintiff now claims.

Furthermore, the Corps informed Defendant in 1974 that the 27.6% allocation was the final allocation. Plaintiff shows no reason why Defendant should not have relied upon that Corps communication.

Plaintiff is correct that Beach testified in his deposition to his understanding that the allocation used in the amended contract was based upon the same "source of data" as was the allocation in the 1964 contract. However, that the allocation was based on the same source of data does not mean that it was not recalculated, nor that it is necessarily incorrect.

Plaintiff attempts to meet his burden of showing that Defendant knew of the alleged falsity of the allocation by showing that Defendant opposed preparation of an updated cost allocation. However, the only evidence Plaintiff produces of such opposition is neither admissible nor probative. It consists of a statement in a memorandum of a Corps official that a new cost allocation would take six months, and that "if it comes out different, locals will not support." There is nothing in the memorandum to indicate the basis for the statement "locals will not support." As such, it lacks foundation. It may be merely speculation, lacking any probative value.

Plaintiff further argues that Defendant sought to avoid an updated cost allocation by forcing an expedited review of the proposed contract through use of improper political influence.

However, the only evidence proffered by Plaintiff that Defendant attempted to exercise improper influence is that Defendant asked its Congressperson to facilitate processing of the contract and met with the person designated by its Congressperson to assist it. This constitutes nothing more [than] the act of petitioning the government. Because of the First Amendment right to petition the government for redress of grievances, entities which engage in otherwise tortious conduct which constitutes such petitioning are immune from liability. *Eastern Railroad Presidents Conference v. Noerr Motor Freight Inc.*, 365 U.S. 127, 137 (1961) (conduct of trying to influence legislation cannot constitute violation of the Sherman Act, even though done with anticompetitive intent which would otherwise be illegal, because "the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives.") It follows that something more than the protected act of petitioning the government must be shown to support an inference of improper conduct. Here, nothing more is shown.

Finally, the Ninth Circuit has expressly held in this case that Plaintiff must show more than "tak[ing] advantage of a disputed legal question" by Defendant. *U.S. ex rel. Hagood*, 929 F.2d at 1421. Plaintiff argues that he has done so because there is no dispute as to whether a new cost allocation was legally required. However, the record shows that there is a substantial dispute as to whether it was required. Several Corps officials concluded that the Corps was bound by the final allocation communicated in the 1974 Pape letter. Furthermore, a Corps headquarters memorandum states that a new cost allocation was not a legal requirement, but merely a waivable policy. Beyond his own legal opinion, Plaintiff cites no authority that a new cost allocation is required when there are changes to a project. Thus, Plaintiff has not made any showing that Defendant has done anything more than taking advantage of a disputed legal question.

Since Plaintiff has failed to proffer evidence which would support a finding that Defendant submitted a false claim by presenting the proposed amended contract to the Corps without

a new cost allocation having been performed by the Corps, summary judgment in favor of Defendant must be entered on the cost allocation claim.

D. *Order*

Therefore, for the reasons stated above, Defendant's motion for summary judgment is hereby granted. The clerk shall enter judgment for Defendant and shall close the file.

IT IS SO ORDERED.

Dated: May 11, 1995

/s/ CLAUDIA WILKEN

Claudia Wilken
United States District Judge

Copies mailed to counsel
as noted on the following page

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA *ex rel.* JAMES M. HAGOOD, *Plaintiff,* v. SONOMA COUNTY WATER AGENCY, *Defendant.*	No. C-88-0991 CW JUDGMENT

This action came on for hearing before the Court, the Honorable Claudia Wilken, United States District Judge, presiding, and the issues having been duly heard and the Court having duly rendered its decision,

IT IS HEREBY ORDERED AND ADJUDGED:

That Plaintiff United States of America *ex rel* James M. Hagood take nothing, that the action be dismissed on the merits, and that Defendant Sonoma County Water Agency recover of Plaintiff United States of America *ex rel* James M. Hagood its costs of action.

Dated: May 11, 1995

/s/ CLAUDIA WILKEN
Claudia Wilken
United States District Judge

Copies mailed to counsel
as noted on attached sheet:

Supreme Court, U.S.
FILED
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No.

IN THE

Supreme Court of the United States

October Term, 1995

UNITED STATES OF AMERICA, *EX REL.*
JAMES M. HAGOOD,

Petitioner,

vs.

SONOMA COUNTY WATER AGENCY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Supplemental Appendix to Petition for Writ of Certiorari

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, ex rel. JAMES M. HAGOOD, *Plaintiff/Appellant,* v. SONOMA COUNTY WATER AGENCY, *Defendant/Appellee.*	No. 89-16290 D.C. No. CV-88-0991-EFL
JAMES M. HAGOOD, *Plaintiff/Appellant,* v. SONOMA COUNTY WATER AGENCY, *Defendant/Appellee.*	No. 89-16360 D.C. No. CV-88-0991-EFL OPINION

Appeal from the United States District Court
for the Northern District of California
Eugene F. Lynch, District Judge, Presiding

Argued and Submitted
February 15, 1991—San Francisco, California

Filed April 2, 1991

Before: Mary M. Schroeder, William C. Canby, Jr. and
John T. Noonan, Jr., Circuit Judges.

Opinion by Judge Noonan

COUNSEL

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Allan J. Joseph, Linda R. Koenig, Connie M. Taevan, Rogers, Joseph, O'Donnell & Quinn, San Francisco, California, for amicus curiae Chamber of Commerce of the U.S.A.

Douglas Letter, United States Department of Justice, Washington, D.C., for amicus curiae United States of America.

OPINION

NOONAN, Circuit Judge:

James M. Hagood brought suit under the qui tam provision of the False Claims Act, 31 U.S.C. §§ 3729-3733, alleging its violation by the Sonoma County Water Agency (the Water Agency). The district court dismissed his third amended complaint for failure to state a cause of action. On appeal, the United States filed a brief as amicus curiae, arguing that the district court was incorrect in its reasoning but right in its result, because the court had no jurisdiction of Hagood's complaint. The jurisdictional issue is novel. We decide it in favor of jurisdiction and reverse the district court on the question of whether Hagood stated a cause of action.

BACKGROUND

In February 1982, as the attachments to Hagood's complaint make clear, Hagood was assistant district counsel to the San Francisco District of the Army Corps of Engineers (the

Corps) and was assigned to represent the district counsel to handle the renegotiation of the Warm Springs Dam Water Supply contract with the Water Agency. Hagood came to the conclusion that the proposed cost allocations for the new contract, which would govern the Water Agency's repayment obligations, did not comply with the terms of the 1958 Water Supply Act, 43 U.S.C. § 390b. The cost allocations proposed by the Corps substantially reduced the obligations of the Agency.

Hagood — again according to the documents attached to his complaint — brought his objections to Colonel Paul Bazilwick, Jr., the District Engineer and Contracting Officer for the project. Bazilwick made what he termed "a command decision" to proceed with the cost allocations as proposed and to accept responsibility for the clauses in the contract to which Hagood had objected. Hagood orally refused to draft the contract in this form. He then received an order from the district counsel to comply with Colonel Bazilwick's order or "suffer the consequences of a refusal to follow a direct order from an individual within your direct chain of command."

On March 25, 1982, Hagood put his legal objections to the contract in writing in a letter addressed to Colonel Bazilwick with carbon copies to various other officers of the Corps. The district counsel responded with a memorandum for the files, disputing Hagood's legal points and specifically arguing that the 1958 Water Supply Act did not apply to the Warm Springs Dam, which had been authorized by Congress in 1962. The memorandum of district counsel concluded that Hagood's personal opinion was not the opinion of legal counsel for the district.

According to the allegations of the complaint, Bazilwick was "in the spring" seeking a job with a company later awarded design work by the Water Agency on the Warm Springs Dam and he "used his position as District Engineer to cause an obstruction as to Hagood raising the most fundamental questions on the purported repayment arrangement. A product of that was threats received by Hagood which basically indicated if you want

your job with Army Corps in San Francisco don't ask any questions."

Meanwhile, the contract that Hagood had refused to prepare had been prepared. According to the allegations of the complaint, the Water Agency "used pressure and influence" to expedite its signing without accurate and current cost allocations. The signatory for the Army was William Gianelli, Assistant Secretary of the Army. According to the complaint, Gianelli had been Director of Water Resources for the State of California, had been involved in that capacity with the Warm Springs Dam, and therefore had "a conflict of interest" in acting on the contract. He knew that "an accurate and current cost allocation" had not been prepared, and this knowledge "is related to his expediting" of the contract. The contract was signed by Gianelli on October 1, 1982.

According to the complaint's allegations, the district counsel advised Hagood in April 1982 "that he was no longer considered an attorney in the San Francisco district," and Hagood was told by unnamed other Corps lawyers that "he had better get out of California." In July 1982 Hagood "found a job in Alaska with the Army Corps." It appears from other parts of the complaint that Hagood's new job was as assistant district counsel in Anchorage. In 1985 he transferred to the Sacramento district of the Corps. In 1987 he retired.

PROCEEDINGS

Pursuant to 31 U.S.C. § 3730(b), Hagood began this suit for himself and for the United States in March 1988. The United States declined to proceed with the suit on its own behalf, but invoking 31 U.S.C. § 3730(c)(2)(A) intervened to ask dismissal of the complaint's claims against two individual defendants, Colonel Bazilwick and the San Francisco district counsel. This motion was granted. Hagood proceeded as the sole plaintiff as provided by 31 U.S.C. § 3730(c)(3). He amended his complaint

so that it named only the Water Agency. The defendant moved to dismiss. The motion was granted with leave to amend.

Hagood's third amended complaint alleged that the Water Agency "knowingly presented, caused to be presented and conspired to present the following false information," to wit, "that a true and correct, and current and accurate cost allocation was contained in the 1982 contract," and various other misstatements and material omissions relating to the contract. The resulting damage to the United States was asserted to be at least $60 million. The Water Agency was further charged, as already noted, with using pressure and influence to expedite the signing of the contract based on this false information.

After a hearing, the district court on September 25, 1989 dismissed with prejudice Hagood's third amended complaint for failure to state a claim for which relief could be granted. In a memorandum opinion the district court analyzed Hagood's complaint as essentially self-contradictory: the complaint alleged fraud by the defendant but also alleged that "the high government officials responsible for taking the action" knew of the facts that made the complaint false. The complaint failed to charge, "with the specificity necessary under Rule 9(b) of the Federal Rules of Civil Procedure," these officials with "acting with any fraudulent intent" toward the government. The district court observed that the closest Hagood came to alleging fraud was his allegations about Bazilwick and Gianelli but that Hagood made "no connection between these allegations and any direct form of wrongdoing by the government employees."

The district court found the facts to be similar to those of *Boisjoly v. Morton Thiokol, Inc.*, 706 F. Supp. 795, 808-10 (D. Utah 1988), and so came to the same conclusion as *Boisjoly*, that it was impossible to say that the government had suffered the kind of injury necessary to impose liability under the False Claims Act. In amplification of this conclusion, the court observed that the United States is not necessarily damaged every time its officers agree to a procedure that diminishes money coming into the Treasury, because the officers may have acted to

promote non-monetary interests of the United States — for example, here, to increase water storage facilities. Moreover, the court noted, "it is difficult to see how any damages to the United States are caused by false statements when officials, with full knowledge of the falsity of the statements, proceed to take an action depriving the government of funds notwithstanding the false statements."

Hagood appealed to this court. The United States was permitted to file a brief amicus curiae. This brief argued that the district court was mistaken in its reasoning for two reasons: under the False Claims Act penalties are recoverable even if the United States sustains no damage from the false claim; and the government's knowledge of a claim's falsity does not preclude recovery. At the same time the brief contended that the district court lacked jurisdiction of Hagood's claim because of "the plain language" of 31 U.S.C. § 3730(e)(4).

ANALYSIS

Jurisdiction. Exclusions of federal jurisdiction, set out in the 1986 amendments to the False Claims Act, are unusually precise:

> No court shall have jurisdiction over an action brought by a former or present member of the armed forces . . . against a member of the armed forces arising out of such person's service in the armed forces. 31 U.S.C. § 3730(e)(1)
>
> No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought. *Id.* (e)(2)(A).

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information. *Id.* (e)(4)(A).
>
> For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information. *Id.* (e)(4)(B).

[1] The jurisdictional bar that the United States contends is applicable is the last. The United States argues that when Hagood became involved in preparation of the disputed contract he was engaged in an "administrative investigation," so that the words of the statutory exclusion are met. The United States further argues that the "public disclosure" required by the statute occurred when Hagood as a government employee "disclosed" to himself as a member of the public the information on which he based his suit.

To say that the argument of the United States is tortured is to state the obvious. Even if we were to construe "investigation" broadly, as the United States argues, it requires a major extension of the term to hold that it includes the preparation of a contract by a lawyer. Without deciding whether such a liberal extension of the statutory language should be made, we hold that no "public disclosure" was made. The public disclosure that the statute requires is public disclosure *in* an administrative investigation. The United States concedes that one government employee telling another government employee is *not* public disclosure. The notion that we should subdivide Hagood into his

governmental self and his nongovernmental self is too metaphysical a contention for the interpretation of a plain congressional enactment. Hagood does not base his suit on any public disclosure made to him or to anyone else. He bases his suit on information that he acquired in preparing the contract; the information was not publicly disclosed.

The United States has neither case law nor legislative history to support its extraordinary reading of a remarkably explicit jurisdictional statute. We join the First Circuit in rejecting the government's position. *United States ex rel, LeBlanc v. Raytheon Co.*, 913 F.2d 17 (1st Cir. 1990).

Basically the United States takes its position in surprise and chagrin at a change in the law made by the 1986 amendments. Although it is not strictly necessary to our decision, we review the history that appears to account for the government's present position. In *United States ex rel Marcus v. Hess*, 317 U.S. 537, 63 S.Ct. 379, 87 L. Ed. 443 (1943), it was held that an informer might recover in a qui tam action under the False Claims Act even if he had "contributed nothing" to the discovery of the fraud but had derived all his information from the government's criminal indictment that set out all the facts now relied on in the qui tam action. The Court noted that under the terms of the act "any person" could bring a suit and that the Senate sponsor of the law had observed that even a district attorney, deriving all his knowledge from his official position, could bring a qui tam suit under the law. *Id.* at 546, 63 S.Ct. at 385. The government objected to such a construction of the law with objections of policy. The Court told the government its objections should be addressed to Congress: "the entire force of these considerations is directed solely at what the government thinks Congress should have done rather than at what it did." *Id.* at 546-547, 63 S.Ct. at 385.

Immediately after *Hess* was decided, Congress did amend the law to exclude "parasitical suits," i.e., those where the government already possessed the information underlying the qui

tam action. "The court shall have no jurisdiction," the amendment provided, "whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer, or employee thereof, at the time such suit was brought." 31 U.S.C. § 232(C)(1976). If this language were in place today, Hagood would be barred. *Pettis ex rel. United States v. Morrison-Knudsen Co.,* 577 F.2d 668 (9th Cir. 1978). But this language disappeared from the statute with the 1986 amendments.

Citing S.Rep. No. 345, 99th Cong., 2d Sess. (1986), U.S. Code Cong. Admin. News 1986, p. 5266, the United States concedes that the purpose of the 1986 amendments was to repeal overly-restrictive court interpretations of the qui tam statute, which had prohibited not only suits by private citizens based on information obtained by the government, but also suits brought by those who had information independently of the government. Clearly, however, what Congress found overly-restrictive interpretation went further than what the government now finds desirable. The new jurisdictional bars were carefully crafted. They were framed by those surely aware of *Hess,* its holding that "any person" means "any person," and its declaration that arguments about the limits on suits by informers should be addressed to Congress not the courts. All that was said in *Hess* is true here. The government has some good policy arguments. "But the trouble with these arguments is that they are addressed to the wrong forum." *Hess,* 317 U.S. at 547, 63 S.Ct. at 386.

There is, of course, no need for Hagood to show that he is "the original source" of the information. That statutory phrase in 31 U.S.C. § 3730(e)(4)(B) comes into play only if an exception is sought to the bar of 4(A). As the bar of 4(A) does not apply, there is no need to invoke the exception.

The Sufficiency of the Complaint. In so many words, Hagood alleges that the Water Agency knowingly presented and caused to be presented and conspired to present a false claim. That a contract based on false information is a species of false claim is undisputed. The contention of the Water Agency, relying on the

district court's opinion, is that Hagood's charge is negated by the rest of his complaint which says that the relevant government officials knew that the information was false.

[2] Aided by the brief of the United States, of which the district court did not have the benefit, we hold that Hagood has not engaged in an exercise of self-contradiction. To be sure, he comes very close to it, especially when the documents annexed to his complaint are considered, for in them it appears that the contract was prepared not by the Water Agency but by the Corps. Nonetheless, reading the complaint generously, as our precedents dictate should be done, it is evident that what the complaint alleges is that the Water Agency played an active part in having presented for signature a contract that the Water Agency knew was based on false information.

What is crucial — and what must be proven at trial—is that the Water Agency knew that the information was false. The statute emphasizes that the act, for which the civil claim may be filed is to "knowingly" present or cause to be presented "a false or fraudulent claim," 31 U.S.C. § 3729(a)(1), or to "knowingly" make, use or cause a false record or statement to be made to get a false or fraudulent claim paid. *Id.* (a)(2), or to "knowingly" make, use, or cause a false record or statement to be made to "decrease an obligation" to pay the government. *Id.* (a)(7). The emphasis on "knowing" and "knowingly" is reinforced by their statutory definitions. *Id.* (b).

[3, 4] Innocent mistake is a defense to the criminal charge or civil complaint. So is mere negligence. The statutory definition of "knowingly" requires at least "deliberate ignorance" or "reckless disregard." To take advantage of a disputed legal question, as may have happened here, is to be neither deliberately ignorant nor recklessly disregardful. But that the Water Agency did no more than that cannot be determined from the complaint.

[5] That a defendant has disclosed all the underlying facts to the government may, the United States in its brief concedes, show that the defendant had no intent to deceive. But what

constitutes the offense is not intent to deceive but knowing presentation of a claim that is either "fraudulent" or simply "false." 31 U.S.C. § 3729(a)(1) and (2). The requisite intent is the knowing presentation of what is known to be false. That the relevant government officials know of the falsity is not in itself a defense, *United States v. Ehrlich,* 643 F.2d 634, 638-639 (9th Cir. 1981). *Boisjoly* may be defensible on its facts; its dicta are an unreliable guide.

As the brief of the United States points out, the knowledge possessed by officials of the United States may be highly relevant. Such knowledge may show that the defendant did not submit its claim in deliberate ignorance or reckless disregard of the truth. But this comforting conclusion for the Water Agency cannot be reached by mere inspection of Hagood's complaint. Only at the stage of trial or summary judgment will it be possible for a court to say, for example, that the Water Agency did merely what the Corps bid it do, that the Water Agency had no knowledge that its contract was based on what Hagood has alleged was false information.

The damages sustained by the United States also can not be determined from the complaint. It may be, as the district court observed, that no damages were suffered when officers of the United States knowledgeably decided to proceed with the contract. The complaint alone does not say what the balance of benefits and harms was; it alleges damages of $60 million. If such damages are shown to have occurred by reason of a false claim, it would be for the defendant to show how they were offset.

[6] A civil penalty of between $5,000 and $10,000, and the costs of the civil action, are also recoverable under the statute, 31 U.S.C. § 3729(a). No damages need be shown in order to recover the penalty. *See Rex Trailer Co. v. United States,* 350 U.S. 148, 153, n.5, 76 S.Ct. 219, 222, n.5, 100 L.Ed. 149 (1956).

[7,8] *Estoppel.* Estoppel is an affirmative defense, Fed. R. Civ. Proc. 8(c). It was not here pleaded. If the opinion of the district court is construed as holding that the United States was

estopped by the knowledge of its officers, the district court's opinion would rely on a defense not before it. In any event, estoppel will not lie against the United States "on the same terms as any other litigant." *Heckler v. Community Health Services,* 467 U.S. 51, 60, 104 S.Ct. 2218, 2224, 81 L.Ed.2d 42 (1984). The defendant's "inability to retain money that it should never have received in the first place" is not the kind of detrimental reliance that justifies estoppel against the government. *Id.* at 61. Such is just this case, if Hagood's allegations prove to be good. "Protection of the public fisc requires that those who seek public funds act with scrupulous regard for the requirements of the law . . . [T]hose who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law." *Id.* at 63. Hagood claims that the Water Agency proceeded unscrupulously, indeed with knowledge of the falsity of its claim, with knowledgeable government officials abetting its behavior. Hagood's allegations constitute a cause of action.

REVERSED and REMANDED.

ENTERED IN CIVIL DOCKET 9-10-1989

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, ex rel, JAMES M. HAGOOD, *Plaintiff,* vs. SONOMA COUNTY WATER AGENCY, *Defendant.*	No. C-88-0991-EFL MEMORANDUM OPINION

James Hagood brought this action against the Sonoma County Water Agency ("the Agency") on behalf of the United States as a plaintiff *qui tam* pursuant to the False Claims Act, 31 U.S.C. § 3729, et seq. ("the Act"). Hagood, who is proceeding *in propria persona*, alleges in his third amended complaint that the Agency knowingly submitted false claims to the United States with regard to its repayment obligations on a dam project constructed by the Army Corps of Engineers ("the Corps"). The Agency moved to dismiss the complaint with prejudice for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). The Court granted the Agency's motion at a hearing on August 28, 1989 and subsequently entered judgment in favor of the Agency on September 25, 1989. The basis for this judgment is set forth in this opinion.

I. *PROCEDURAL BACKGROUND*

Hagood filed his original complaint in this case on March 22, 1988, naming the Agency and two individual federal government employees as defendants. The matter was ordered sealed to allow the United States to determine whether to intervene in the action under section 3730 of the Act. On November 28, 1988, the United States decided to intervene only to have the action dismissed against the individual defendants. The Court granted the motion to dismiss the individual defendants on March 7, 1989 and ordered the seal lifted.

Hagood, proceeding *qui tam* under section 3730 of the Act, filed his second amended complaint, naming only the Agency as defendant. The Agency moved to dismiss this complaint. This motion was granted with leave to amend on May 30, 1989. After substituting himself as counsel, Hagood filed a third amended complaint against the Agency, which again moved for dismissal with prejudice. The Court granted this motion orally on August 28, 1989 and entered judgment for the Agency on September 25, 1989. The Court's reasoning in granting the motion to dismiss with prejudice is as follows.

II. *FACTS AS ALLEGED IN THE COMPLAINT*

Hagood's charge of wrongdoing against the Agency grows out of construction of a water storage facility in Sonoma County, California for the Agency by the Corps. Planning for the dam's construction began in 1964, when the Agency and the Corps entered into a contract for construction of a dam with water storage capacity of 132,000 acre feet ("the Dry Creek Project"). Under this contract, the Agency was to repay the Corps 29% of its construction costs based on an allocation of the expenses related to water storage. *See* 43 U.S.C. § 390(b).

In 1975, the project was modified in order to increase the water storage capacity of the dam by 60% to 212,000 acre feet ("the Warm Springs Project"). Hagood alleges that this modification was adopted by the Corps without the required submission by the Agency of an accurate cost allocation based on the larger scale of the new Warm Springs Project. He claims that the Agency's repayment obligations should have increased as a result of the modification and the failure to require a new cost allocation caused significant monetary damage to the United States.

Furthermore, Hagood alleges that in 1982 the Agency sought to decrease its repayment obligations to 27% of the total cost of the Warm Springs Project by either intentionally submitting a false cost allocation or by failing to submit one altogether, causing the United States to rely on an obsolete cost allocation made in 1969. By Hagood's estimate, a proper cost allocation

would have revealed that the Agency should have repaid the Corps for 50% of its construction costs. Hagood also alleges that the 1982 modifications to the Dry Creek agreement allowed the Agency to begin repayment ten years later than legally required and to benefit from interest deferment for a longer period than statutorily allowed.

Hagood directed the attention of his superiors in the legal counsel's office at the Corps to these alleged deficiencies in the 1982 modifications. He claims that he was ordered to draft a contract embodying the modifications notwithstanding their illegality. Upon his refusal to do so, he alleges that he was threatened by Steve Lingenfelter, the district counsel for the Corps, and Paul Bazilwich, a Colonel in the Corps. Hagood later informed army generals and a United States Senator of the irregularities, none of whom took any action. After these contacts, Hagood claims that he received phone calls from employees of the Corps threatening his personal safety. Despite his efforts, Hagood alleges that a "Mr. Gianelli," whom he identifies as an Assistant Secretary of the Army, expedited the approval of the contract with full knowledge of its legal and financial defects.

III. *HAGOOD'S FAILURE TO STATE A CLAIM UNDER THE ACT*

In ruling on a motion to dismiss for failure to state a claim, all material allegations set forth in the complaint must be accepted as true and construed in the light most favorable to the plaintiff. *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). It appears to be the gist of Hagood's 36-page complaint that the terms of the 1982 agreement modifying the original Dry Creek repayment terms without an accurate cost allocation constitute a false claim against the United States within the meaning of the Act, costing the government some $60 million in damages. Defendant argues that the extensive information had by the government about the lack of an accurate cost allocation as alleged in Hagood's complaint precludes a finding of damage to the government, therefore calling for a dismissal of the complaint for failure to state a claim for which relief can be granted.

In order to state a claim under the Act, a *qui tam* plaintiff must plead the existence of a false claim against the United States as defined in Section 3729(a) of the Act, which reads in pertinent part:

> **Liability for certain acts.** —Any person who—
>
> (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;
>
> (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;
>
> (3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;
>
> . . .
>
> (6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the government, or a member of the Armed Forces, who lawfully may not sell or pledge the property[1];
>
> (7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government;
>
> is liable to the United States for a civil penalty . . .

Section 3730 of the Act further permits a *qui tam* plaintiff to recover an award of up to 30% of the damages and penalties

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[1] Hagood relies on this subsection in one paragraph of his third amended complaint, which alleges that failure to make the proper repayments on the water storage facilities amounts to a sale of "public property" by government officials unauthorized to make such a sale. The Court views this allegation as simply a restatement of Hagood's allegations under the other subsections of the Act and feels that the transactions involved in this case do not involve a sale of public property as meant in this subsection. As such, the Court has not considered this single allegation separately from the rest of Hagood's complaint.

assessed against the false claimant in the event that the government chooses not to intervene in the case.

Prior to 1986, Hagood's complaint would clearly have been subject to the jurisdictional bar of section 3730(b)(4), which prevented a *qui tam* plaintiff from bringing an action "based on information or evidence the government had when the action was brought." *See U.S. ex rel. Weinberger v. Florida*, 615 F.2d 1370 (5th Cir. 1980) (decided under 31 U.S.C. § 232, the predecessor to the current Act). However, Congress removed this jurisdictional bar when it amended the Act in 1986; the amended language of the Act contains the jurisdictional bar only in relation to false claim actions against members of Congress, the judiciary, or senior executive branch officials. 31 U.S.C. § 3730(e)(2)(A). The legislative history of the amendments to the Act indicates that Congress intended to "repeal[ ] the jurisdictional bar for most suits" except those "which might be politically motivated." S.Rep. No. 345, 99th Cong., 2d Sess. 29, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5266, 5294. Therefore, Hagood is not *jurisdictionally* prevented from bringing this suit under the Act.[2] The Agency does not make this contention, however. Rather, the Agency argues that Hagood has failed to allege, and cannot allege, either that the United States has been damaged by the actions of the Agency or that the Agency's actions caused any damages to the United States. The crucial question before the Court in this case is whether allegations of the false claim can be actionable under the Act even with full knowledge of false statements on the part of high ranking government officials with the authority to approve the 1982 modifications to the Agency's

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[2] The Court previously ruled that the 1986 amendments to the Act applied retroactively to this case. The Court reiterates that ruling here on the basis of the weight of authority construing the amendments as retroactive. *See, e.g., United States v. Oakwood Downriver Medical Center*, 687 F. Supp. 302 (E.D. Mich. 1988); *Gravitt v. General Elec. Co.*, 680 F. Supp. 1162 (S.D. Ohio 1988); *United States v. Hill*, 676 F. Supp. 1158 (N.D. Fla. 1987); *United States v. Board of Educ. of Union City*, 697 F. Supp. 167 (W.D. Wis. 1988).

repayment terms without allegations of any conspiracy or fraudulent conduct on the part of those officials.

The 1986 amendments to the Act did not change the fact that the Act remains a statute for combatting fraud against the government. While it may not be required that Hagood plead the elements of common law fraud, the Act requires that he plead at least 1) a claim for payment against the government, and 2) that the claim is false or fraudulent. *Boisjoly v. Morton Thiokol, Inc.*, 706 F. Supp. 795, 808 (D. Utah 1988). Another court has gone even further, listing the elements of a false claim under the Act as:

> 1. The defendant presented or caused to be presented, for payment or approval, to the Government of the United States a claim upon or against the United States;
>
> 2. The claim was false or fictitious;
>
> 3. The defendant knew that the claim was false, fictitious, or fraudulent; and
>
> 4. To recover damages, *it must be shown that the United States sustained damages by reason of the false claim.*

United States v. Board of Educ. of Union City, 697 F. Supp. 167 (D.N.J. 1988)(emphasis added).[3]

Hagood has failed in his third amended complaint to properly allege the elements of a claim under the Act under either of the above standards. Where the complaint alleges on its face knowledge of the claimed false statements among high level governmental officials responsible for taking the action which allegedly causes the damage to the government, a claim under the Act is "effectively negated." *Boisjoly*, 706 F. Supp. at 809. Without any allegation of participation in the fraud against the government by the governmental officials with knowledge of the

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[3] Both Hagood and the Agency agree in their written submissions on the motion to dismiss that *Union City* properly states the requirements for a claim under the Act.

false statements, "if the complaint itself alleges that the government knew of those very facts or characteristics which allegedly make the claim false, no claim has been stated." *Id.* at 810.

In *Boisjoly*, a *qui tam* plaintiff brought an action against the manufacturer of the defective joint seals thought to be responsible for the explosion of the space shuttle Challenger. His complaint alleged that NASA had known "for years" that the joint seals were defective. *Id.* at 809. The court dismissed the plaintiff's complaint because high level governmental officials had knowledge of fraudulent statements by the defendant. On those facts, it was impossible for the court to say that the government "had suffered the kind of injury necessary to invoke [False Claim Act] liability." *Id.*

The instant case seems to fall squarely within the facts of *Boisjoly*. Hagood alleges that a number of high ranking officials in the Corps and the Army knew about the Agency's alleged false claims. For whatever reason, whether it was ignorance of the law or political expediency, those officials chose to proceed with the Warm Springs contract. Hagood has failed, and indeed refused, to plead that these officials were acting with any fraudulent intent toward the government with the specificity necessary under Rule 9(b) of the Federal Rules of Civil Procedure.[4] Rather, Hagood would have the Court find that a claim is actionable under the False Claims Act whenever fully informed high

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[4] Besides vague allegations of some sort of conspiracy throughout the complaint, Hagood makes only two specific allegations which could conceivably amount to fraudulent behavior on the part of governmental employees responsible for approving the Warm Springs contract. First, he alleges that Gianelli, as a former employee of the California Department of Water Resources, had "a conflict of interest" and should have recused himself from considering the 1982 contract. He also alleges that Bazilwich, the Army colonel who ordered Hagood to prepare the 1982 contract, was looking for a job with a private contractor involved in construction of the Warm Springs project. He makes no connection between these allegations and any direct form of wrongdoing on the part of the government employees in relation to the Warm Springs contract. As such, his complaint fails to meet the requirements of Rule 9(b).

ranking officials acting within their authority take an action which may deprive the United States Treasury of some funds.[5]

The Court refuses to accept this statement of the type of injury to the United States required to state a claim under the Act. The Court agrees with the *Union City* court, which required a showing of both damage to the United States and causation of the damage by the false statements. The United States is not necessarily damaged when its officials act, in an absence of fraudulent intent, in a way which may diminish funds coming into the Treasury, as these officials may take such action for other reasons beneficial to the United States, such as expediting the construction of increased water storage facilities. Furthermore, it is difficult to see how any damages to the United States are caused by false statements when officials, with full knowledge of the falsity of the statements, proceed to take an action depriving the government of funds notwithstanding the false statements.

For these reasons, Hagood's third amended complaint is dismissed. The Court refuses to accept Hagood's position that the removal from the Act of the "knowledge in the government" jurisdictional bar by Congress altered the underlying nature of the Act as a fraud statute. Hagood is not barred jurisdictionally from bringing this action. Rather he has failed to allege any damage or causation of such damage to the United States by the Agency's alleged false statements where highly placed governmental officials knew of the falsity of the statements, yet acted upon them anyway without an fraudulent intent.

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[5] Indeed, Hagood contended at oral argument on the motion to dismiss that he would have a claim against the Agency even if the President of the United States had approved the 1982 contract with full knowledge of the alleged misrepresentations by the Agency. He argued that section 3729(b) of the Act, which defines the terms "knowing and knowingly" as including individuals who act with "reckless disregard of the truth," would apply in this situation. A simple reading of the statute reveals that Hagood has completely missed the point of section 3729(b), which is clearly meant to apply to the party alleged to be defrauding the government, and not the government officials who act upon an alleged misstatement.

IV. *DISMISSAL OF HAGOOD'S COMPLAINT WITH PREJUDICE*

It is of course well established that a motion to dismiss a complaint should not be granted unless it appears beyond a reasonable doubt that the plaintiff can prove no set of facts which would entitle him to relief. *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). In those circumstances where a defendant has shown that a plaintiff's complaint fails to state a claim, leave to amend the defective complaint will normally be granted. As an exception to these rules, a motion to dismiss with prejudice will be granted when amending the complaint would serve no purpose or would be futile. *Havas v. Thornton,* 609 F.2d 372, 376 (9th Cir. 1979).

In this case, the Court has granted the Agency's motion to dismiss with prejudice and judgment has been entered accordingly. As discussed above, Hagood's third amended complaint failed to allege the requisite injury or causation of that injury necessary to state a claim under the Act. His second amended claim was dismissed with leave to amend on the same grounds on May 30, 1989. At a hearing on the earlier motion, the Court asked Hagood to amend his complaint to allege with more specificity the names of government officials involved in the approval of the 1982 contract, the degree of their knowledge of the alleged false statements by the Agency, and any wrongdoing or fraudulent intent on the part of those officials.

Hagood's third amended complaint was indeed more detailed, but alleged essentially the same facts. If anything, the allegations of knowledge of the false statements of particular high level officials with the power to approve the contract made the third amended complaint even more vulnerable to a motion to dismiss because, while it alleged detailed and specific knowledge of highly placed officials, it failed to sufficiently allege any wrongdoing by these government officials as requested by the Court. At oral argument on the motion, the Court repeatedly offered Hagood another opportunity to amend his complaint to include such allegations, but it became clear from Hagood's position that he would not, or could not, do so. Rather, Hagood

insisted that mere allegations of monetary loss to the United States Treasury were sufficient to state a claim under the Act.

As such, the Court dismissed Hagood's third amended complaint with prejudice because it viewed any amendment along the lines of Hagood's theory as futile, having already considered and ruled on the motion twice. Where a plaintiff seeks merely to restate previously considered claims in an amended complaint, the district court may properly deny leave to amend. *Fidelity Financial Corp. v. Federal Home Loan Bank,* 792 F.2d 1432, 1438 (9th Cir. 1986). Hagood has made his argument clear to this Court in his several "bites at the apple," and the Court views his position as legally flawed. Considering his refusal to reconsider his position and submit an amended complaint sufficiently alleging wrongdoing or fraudulent intent on the part of government officials, the Court had no choice but to issue a judgment upon dismissal of Hagood's third amended complaint.

DATED: October 16, 1989.

/s/ EUGENE F. LYNCH

EUGENE F. LYNCH
United States District Judge

FALSE CLAIMS ACT

31 U.S.C. 3729 *et seq.*

§ 3729. False claims

a) **Liability for certain acts.** Any person who—

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that—

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action, had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) **Knowing and knowingly defined.** For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information—

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information

and no proof of specific intent to defraud is required.

(c) **Claim defined.** For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) **Exemption from disclosure.** Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) **Exclusion.** This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1954. (As amended Oct. 27, 1986. P. L. 99-562, § 2. 100 Stat. 3153.)

§ 3730. Civil actions for false claims

(a) **Responsibilities of the Attorney General.** The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) **Actions by private persons.** (1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it

receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) **Rights of the parties to qui tam actions.** (1) If the government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation such as—

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government's so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When the person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless

permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person's initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) **Award to qui tam plaintiff.** (1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending

upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) **Certain actions barred.** (1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in [section] paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(f) Government not liable for certain expenses. The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) Fees and expenses to prevailing defendant. In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

(As amended Oct. 27, 1986, P. L. 99-562, §§ 3, 4, 100 Stat. 3154. 3157: Nov. 19, 1988, P. L. 100-700, § 9, 102 Stat. 4638: May 4, 1990, P. L. 101-280, § 10(a), 104 Stat. 162.)

§ 3731. False claims procedure.

(a) A subpena requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title may be served at any place in the United States.

(b) A civil action under section 3730 may not be brought—

(1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,

whichever occurs last.

(c) In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(d) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud, or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.
(As amended Oct. 27, 1986, P. L. 99-562, § 5, 100 Stat. 3158.)

§ 3732. False claims jurisdiction.

(a) Actions under section 3730. Any section under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, tranacts business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

(b) Claims under state law. The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730.

(Added Oct. 27, 1986, P. L. 99-562, § 6(a), 100 Stat. 3158.)

§ 3733. Civil investigative demands

(a) In general. (1) Issuance and service. Whenever the Attorney General has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation, the Attorney General may, before commencing a civil proceeding under section 3730 or other false claims law, issue in writing and cause to be served upon such person, a civil investigative demand requiring such person—

(A) to produce such documentary material for inspection and copying,

(B) to answer in writing written interrogatories with respect to such documentary material or information,

(C) to give oral testimony concerning such documentary material or information, or

(D) to furnish any combination of such material, answers, or testimony.

The Attorney General may not delegate the authority to issue civil investigative demands under this subsection. Whenever a civil investigative demand is an express demand for any product of discovery, the Attorney General, the Deputy Attorney General, or an Assistant Attorney General shall cause to be served, in any manner authorized by this section, a copy of such demand upon the person from whom the discovery was obtained and shall notify the person to whom such demand is issued of the date on which such copy was served.

§ 3333(a)-(2)-(l)—[Omitted as provisions not involved in this case.]

1958 Water Supply Act 43 U.S.C 390b et. seq.

§ 390b. Development of water supplies for domestic, municipal, industrial, and other purposes

(a) Declaration of policy

It is hereby declared to be the policy of the Congress to recognize the primary responsibilities of the States and local interests in developing water supplies for domestic, municipal, industrial, and other purposes and that the Federal Government should participate and cooperate with States and local interests in developing such water supplies in connection with the construction, maintenance, and operation of Federal navigation, flood control, irrigation, or multiple purpose projects.

(b) Storage in reservoir projects; agreements for payment of cost of construction or modification of projects

In carrying out the policy set forth in this section, it is hereby provided that storage may be included in any reservoir project surveyed, planned, constructed or to be planned, surveyed and/or constructed by the Corps of Engineers or the Bureau of Reclamation to impound water for present or anticipated future demand or need for municipal or industrial water, and the reasonable value thereof may be taken into account in estimating the economic value of the entire project: *Provided,* That the cost of any construction or modification authorized under the provisions of this section shall be determined on the basis that all authorized purposes served by the project shall share equitably in the benefits of multiple purpose construction, as determined by the Secretary of the Army or the Secretary of the Interior, as the case may be: *Provided further,* That before construction or modification of any project including water supply provisions for present demand is initiated, State or local interests shall agree to pay for the cost of such provisions in accordance with the provisions of this section: *And provided further,* That not to exceed 30 per centum of the total estimated cost of any project may be allocated to anticipated future

demands where State or local interests give reasonable assurances, and there is reasonable evidence, that such demands for the use of such storage will be made within a period of time which will permit paying out the costs allocated to water supply within the life of the project: *And provided further,* That the entire amount of the construction costs, including interest during construction, allocated to water supply shall be repaid within the life of the project but in no event to exceed fifty years after the project is first used for the storage of water for water supply purposes, except that (1) no payment need be made with respect to storage for future water supply until such supply is first used, and (2) no interest shall be charged on such cost until such supply is first used, but in no case shall the interest-free period exceed ten years. The interest rate used for purposes of computing interest during construction and interest on the unpaid balance shall be determined by the Secretary of the Treasury, as of the beginning of the fiscal year in which construction is initiated, on the costs of the computed average interest rate payable by the Treasury upon its outstanding marketable public obligations, which are neither due nor callable for redemption for fifteen years from date of issue. The provisions of this subsection insofar as they relate to the Bureau of Reclamation and the Secretary of the Interior shall be alternative to and not a substitute for the provisions of the Reclamation Projects Act of 1939 (53 Stat. 1187) [43 U.S.C.A. § 485 et seq.] relating to the same subject.

(c) Application to other laws

The provisions of this section shall not be construed to modify the provisions of section 701-1 of title 33 and section 390 of this title, as amended and extended, or the provisions of sections 372 and 383 of this title.

(d) Approval of Congress of modifications of reservoir projects

Modifications of a reservoir project heretofore authorized, surveyed, planned or constructed to include storage as provided

in subsection (b) of this section which would seriously affect the purposes for which the project was authorized, surveyed, planned, or constructed or which would involve major structural or operational changes shall be made only upon approval of Congress as now provided by law.

(Pub.L. 85-500, Title III, § 301. July 3, 1958, 72 Stat. 319; Pub.L 97-88. § 1 July 20, 1961, 75 Stat. 210.)

MEMO FOR RECORD

Re: Enlarged Warm Springs Dam Project, and proposed Draft Contract for Repayment of Costs under 1958 Water Supply Act Between U.S. and Sonoma County Water Agency

1. In my legal opinion, the 1958 Water Supply Act, 43 U.S.C. 390 et seq., and the authorizing act for the Warm Springs Dam Project, P.L. 87-874, requires that the "entire cost" allocated to water supply storage shall be repaid to the U.S. not later than 50 years after the project is first used for the storage of water supply purposes.

2. Also, there is no legal basis for authorizing the deferral of interest payments allocated to future water supply beyond ten years after the plant in service date. I have examined other water supply contracts which conform with the 1958 Water Supply Act—e.g. contract between the U.S. and McGee Creek Authority on McGee Creek Project. This 1979 contract is consistent with the repayment provisions of the 1958 Water Supply Act. In contrast, the proposed draft contract between the U.S. and the Sonoma County Water Agency on the enlarged Warm Springs Dam Project, in my opinion, does not reflect repayment terms which are consistent with the 1958 Water Supply Act. As mentioned, it is my opinion that 43 U.S.C. 390(b) requires repayment in a period not to exceed 50 years. It states "and provided further that the entire amount of construction costs, including interest during construction, allocated to water supply shall be repaid within the life of the project *but in no event to exceed 50 years after the project is first used for* the storage of water for water supply purposes, except that (1) no payment need be made with respect to storage for future water supply until such supply is first used, and (2) no interest shall be charged on such cost until such supply is first used, but in no case shall the interest free period exceed ten years." In my opinion, there is no exception to the 50 year repayment *term,* and the exception, as stated, applies only to the initiation of payments for future water supply. The statute still requires that the *term,* of repayment for the "entire

amount" shall "*in no event* exceed fifty years after the project is first used for the storage of water for water supply purposes." The "entire amount" covers future water supply, and local interests are required to provide evidence that its demands for water supply will be made within a period to repay the "entire amount in a period not to exceed 50 years after the project is put into operation. This has been thoroughly discussed with the District Engineer who will be entering into the contract on behalf of the U.S. and we understand that we have a difference of opinion. As I understand the District Engineer's interruption [sic], he believes that the statute provides for an exception to the 50 year repayment term for the "entire amount," and that this entire amount may be paid back well beyond 50 years by applying a 50 year payment period to various future blocks composing the "entire amount," by staggering the initiation of the payment period for the various amounts associated with the blocks that compose the "entire amount." The District Engineer believes that the payment period may extend beyond 50 years, and that the *payment* of interest may likewise be deferred beyond the 10 year period until use of future supply is initiated provided interest starts occurring on the 10th year. The interest rate on the project is 3.2% as determined by Engineering. As mentioned, I do not agree with the District Engineer's interpretation which I believe provides for exceptions not provided for by the statute, and which are inconsistent with the statute. Conversely, the District Engineer does not agree with my interpretation. While recognizing this difference of opinion, it is further noted that the District Engineer's interpretation as reflected in the above-mentioned Warm Springs draft contract is probably *not* inconsistent with the previous position of the Corps General Counsel's office (OCE) and the draft contract format furnished by OCE.

3. It is my understanding that the District Engineer plans to submit this matter to the General Counsel's Office for his review since this matter will eventually be approved by higher authority. Nevertheless, based on the matters mentioned above, I do not agree with the OCE—District Engineer interpretation on this and related matters.

4. In this regard, the 1962 authorizing legislation, P.L. 87-874, approved the project in accordance with House Document 547 which provided in that report for a cost allocation on a project whose total storage was 277,000 A.F. and 132,000 A.F. out of that total was for water supply storage.

5. In my opinion, the Chief of Engineers' apparent decision to increase the total storage and water conservation storage to 381,000 A.F. and 212,000 A.F. respectively without Congressional authorization does not accord with 43 U.S.C. 390(b)(d) which provides that: "Modification of a reservoir project heretofore authorized, planned, or constructed to include storage as provided in subsection (b) of this section which would seriously affect the purposes for which the project was authorized, surveyed, planned, or constructed, or which would involve major structural or operational changes shall be made only upon the approval of Congress as now provided by law. "By passing 43 U.S.C. 390," Congress limited the Chief of Engineers authority to make discretionary changes on water supply storage projects, and the broad discretionary authority applicable to flood control purposes does not provide a basis to disregard the statutory duties imposed in 43 U.S.C. 390(b)(d). This view was also recognized by Division Planning in its memo attached hereto for review.

6. However, as a result of the former Chief of Engineers previous decision, a report with a cost allocation for the enlarged project has not been submitted to Congress for its authorization. As mentioned, the cost allocation for the authorized project referred to in House Document 547 was submitted to Congress when it authorized the smaller project in accordance with that report. The Supreme Court and the 9th Circuit Court of Appeals ruled that appropriation of funds for a project does not constitute authorization of a project, and that it can not be inferred that a project is authorized from appropriations. Libby Rod and Fun Club v. Poteat 594 F. 2d 742 1979, and T.V.A. v. Hill 437 U.S. 153, 98 S.Ct. 2279, 57 L. Ed. 2d 117 1978. The Chief of Engineers' decision that he had discretionary authority to enlarge the

Warm Springs Project was made prior to the above-mentioned court decisions. In my opinion, the fact that the Corps may have sought and received appropriations for an enlarged project would not constitute the required authorization based on the court decisions mentioned above. Consequently, based on the former Chief of Engineers previous decision, the San Francisco District is now in a position of undertaking an enlarged project which has not been submitted to Congress for its authorization.

7. The San Francisco District (Engineering) has proposed that Sonoma County Water Agency reply [sic] to the U.S. 27.8% of the Construction costs for enlarged Warm Springs Dam. This is less than the Sonoma County's cost share of 29% associated with the smaller project. The enlarged project has a relatively higher percentage of storage allocated to water supply than the smaller project, and the proposed contract provides for Sonoma County's right to utilize .02% of the total storage space for water conservation storage (adjusted for sediment). Since a cost allocation for the enlarged project has not been included in an authorization report for Congressional approval as was the case for the smaller project, there is certainly no assurance that Congress would approve the cost allocation associated with the larger project if an authorization report were submitted to Congress in accordance with 43 U.S.C. 390b. A 1% difference in the cost allocation share is over $3 million based on fiscal 1981 estimated prices.

8. Also, of the total increase in storage (104,000 A.F.) for which enlargements in the project are proposed and being made, 76% of that storage increase is for water supply storage.

9. For the Corps to administratively enlarge the Warm Springs Project, which enlargements are based on increasing the water supply in the smaller project by 60% (80,000 A.F./132,000 A.F.), and to reduce the cost percentage to Sonoma County associated with the enlarged project, and to undertake such actions without Congressional authorization, is a matter which I believe should be seriously reconsidered. Again, in my opinion, the above-mentioned court decisions, and 43 U.S.C 390(b)(d)

would require Congressional authorization for the enlarged Warm Springs Project. If the District Engineer does not agree with my legal interpretations, his decision may not be inconsistent with the previous decision of the former Chief of Engineers as mentioned above. This is a further recognition of my differences of opinion on this matter. The District Engineer has been fully apprised of my opinions, the court decisions mentioned above. Also, this and related matters have been discussed with the District Engineer, Warm Springs Dam Project Coordinator and others.

JIM HAGOOD
Assistant District Counsel

CF: **Col. Bazilwich**
District Engineer

Cpt Scott Moseley
Warm Springs Dam
Project Coordinator

DISPOSITION FORM

REFERENCE OR OFFICE SYMBOL	SUBJECT
SPNOC	Draft Warm Springs Dam Contract

TO	FROM	DATE
Capt. Scott Moseley Engineering Div.	Assistant District Counsel	30 Nov 1981

In response to your request for "correction" and/or comments on the *draft* contract between the U.S. and the Sonoma County Water Agency (SCWA) on the Warm Springs Dam Project and S.C.W.A.'s repayment obligations, the following is provided:

1. As you know through discussions, it is my opinion that the repayment terms being proposed by S.C.W.A. and incorporated into the draft contract are not in accordance with the statutory repayment requirements of the 1958 Water Supply Act, 43 U.S.C. 390 et. seq. Since this matter has been discussed extensively, there is no reason to comment further other than to note that in my opinion the terms for repayment to the U.S. are not consistent with the requirements of the 1958 Water Supply Act. The District Engineer and I have acknowledged that we have a difference of opinion on this matter.

2. It is suggested that the definition of "annual anniversary date", page 26, item 1, be changed as per the attached.

3. Also, please note the attached document on the distribution of the sediment reservation.

/s/ JIM HAGOOD

JIM HAGOOD

* MFR — In meeting on 30 Nov., 1981 with Col. Bazilwich, District Engineer, Jay Soper, Chief of Engineering San Francisco District, and Capt. Mosely, Warm Springs Dam Project

Coordinator, I advised them that in my opinion the contract being proposed by the District, and proposed by Engineering did not adhere to the repayment requirements of the 1958 Water Supply, and that I would not prepare such a contract since in my opinion I did not agree with it. At that point Col. Bazilwich advised me that if he tells me to do something I have to do it even if I disagree with it on legal grounds. Also I was advised by Mr. Soper that "Lawyers don't have any ethics." I again stated that in my opinion the proposed contract did not comply with the 1958 Water Supply Act and that I was entitled to my opinion.

JIM HAGOOD
30 Nov 1981

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* Handwritten copy

SPNOC
Col. Paul Bazilwich, Jr.

[LETTERHEAD]

25 March 1982

Col. Paul Bazilwich, Jr.
District Engineer, and
Contracting Officer on Warm Springs Dam Project
211 Main Street, 9th Floor
San Francisco, Calif.

Re: Enlarged Warm Springs Dam Project, Sonoma County, California, Repayment Rights of U.S. for Water Supply Storage for Municipal and Industrial Storage under 1958 Water Supply Act, 43 U.S.C. 390 et seq.

Dear Col. Bazilwich:

This is in regards to the above mentioned matter.

In my legal opinion, the repayment contract which you have directed with the Sonoma County Water Agency (S.C.W.A.) on the enlarged Warm Springs Dam Project (W.S.D.P.) does not comply with the 1958 Water Supply Act, 43 U.S.C. 390(b) et seq., and substantially understates the amounts required to be repaid to the U.S. by law. The total estimated cost for the Warm Springs Dam Project is $312 million. This is based on 1982 cost data which includes actual costs incurred and remaining projected costs.

You have made "command decisions" concerning the above-mentioned draft contract for the W.S.D.P., and have ordered and directed repayment provisions for the S.C.W.A. which provides for: (1) S.C.W.A.'s repayment of 27% of the total project costs of the enlarged W.S.D.P. based on a 1967 cost

allocation in the San Francisco District Engineering Department's General Design Memorandum; (2) a repayment term beyond 50 years after the project is put into operation, and (3) deferred *payment* of interest (3⅛%) beyond 10 years after the date the project is put into operation. As you know, I have totally disagreed with your above mentioned decisions, and have indicated to you that in my opinion they do not comply with the statutory requirements of the 1958 Water Supply Act 43, U.S.C. 390(b) et seq.

In several meetings with you, I have advised you of my objections to your decisions, and indicated to you that I would not prepare, participate in, or approve a draft repayment contract reflecting your decisions which substantially understate the amount of repayment to the U.S. required by law. My legal objections to your actions, directives, and decisions on the modifications enlarging the Warm Springs Dam Project and the draft repayment contract are based on the following:

a. Congress authorized the W.S.D.P. pursuant to P.L. 87-874 in accordance with House Document 547 which provided for the Sonoma County Water Agency (S.C.W.A.) to repay the U.S. the percentage of the total project costs for a project with 132,000 acre feet (A.F.) of water supply storage for municipal and industrial purposes (M. and I.) based on conditions prevailing at the time of construction and actual costs incurred, and the furnishing of assurances satisfactory to the Secretary of the Army for repayment of such costs.

b. Congress approved the W.S.D.P. with 132,000 A.F. of water supply storage for M. and I. purposes based on the above and the repayment amount for that project prevailing prior to construction was in the 1964 contract and was *29%* of the total project costs. This repayment amount was later reduced by the Corps Engineering Department in its General Design Memo prepared between 1967-1969 (hereinafter referred to as 1967

GDM). See attached cost allocation in GDM (Incl. 1). Congress never approved this reduction, nor amended P.L. 87-874 to allow for such a reduction for a 132,000 A.F. water supply storage for M. and I. purposes in the W.S.D.P.

c. Also, in connection with reducing the repayment amount for a 132,000 A.F. water supply storage project (to 24%), the San Francisco District's Engineering Department in its 1967 GDM prepared as an alternative the substantial modification of the authorized project by increasing the water supply storage for M. and I. purposes by 60% to 212,000 A.F. and further effectively reduced S.C.S.W.s repayment obligation for an enlarged water supply storage project for M. and I. purposes. The total increase in storage proposed was 104,000 A.F. and of that amount 77% or 80,000 A.F. was for added water supply storage. The cost sharing percentage you are proposing in the contract is 27.76. Any reference to 27% also refers to 27.76, and 27% is used for convenience without repeating the decimal points. The reduction to 27% by the Corps Engineering Department (not Congress) for the enlarged project was related to and based on the above-mentioned previous reduction to 24% from 29% (based on the 1964 contract) for the 132,000 A.F. project authorized by Congress. The total storage for this multi-purpose project for flood control, water supply, and recreation, was 277,000 A.F., and of that amount 132,000 A.F. was for water supply storage. In the enlarged W.S.D.P., which has not been submitted to the full Congress in accordance with 43 U.S.C. 390(b) for its approval, the total storage being built into that project is 381,000 A.F., and 55% of that amount or 212,000 A.F. is for water supply storage. The modification enlarging the water supply storage for M. and I. on a percentage basis) and simultaneously reducing the repayment obligation of the S.C.W.A. was *not* approved by Congress in accordance with 43 U.S.C. 390(b)(d), or pursuant to an amendment to P.L. 87-874. Appropriations for an enlarged project do

not constitute an authorization. *T.V.A. v. Hill* 437 U.S. 153, 1978, and *Libby Rod and Gun Club v. Poteat* 594 F 2d 749, 1979.

d. Despite the Engineering Department's major modifications, enlarging the project and the reducing the repayment obligations to the United States which were different from that approved by Congress pursuant to P.L. 87-874, the Corps has not submitted the modifications (modifications in project and modifications in repayment obligations) to Congress for approval as required by 43 U.S.C. 390(b)(d), due to the positions taken in the 1967 GDM and the Corps' comments on that document.(1) Furthermore, you have decided in connection with your "command decisions" not to forward or submit this decided matter to the *full* Congress for its approval pursuant to the above statutory requirements. In my opinion, the major modifications which you are proposing and which effectively reduce the S.C.W.A. repayment obligations are subject to 43 U.S.C. 390(b)(d), and I have advised you of this. You disagree with me on this matter, as well as other matters.

e. After the project was enlarged in the design stage, and the Engineering Department effectively reduced the S.C.W.A. repayment obligation (despite the addition of 80,000 A.F. of

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(1) If the Corps submits the major modifications, which were indicated as "major changes" by the former Chief of Engineering (OCE), to the full Congress for its approval in accordance with 43 U.S.C. 390(b) and it relies on the 1967 GDM and cost allocation, then that document would become the Congressional document for purposes of authorization. If the Corps is going to continue to rely on the 1967 GDM cost allocation, it should be submitted to the full Congress. Project modifications authorized by Congress pursuant to Public Law (P.L.) are numerous; e.g., note P.L. 94-587. Sections 194 and 196. Engineering does *not* agree that modifications require authorization and is of the opinion that major modifications can be made in the design stage as was done in the case of the W.S.D.P. *without* Congressional authorization.

water supply storage for M. and I. purposes), the project costs *increased over 240 million dollars.*

f. The Chief of Engineers apparently assumed that he had discretionary authority to enlarge the project based on the representations of the San Francisco District Engineering Department in the 1967 GDM that the cost to enlarge the project would only be *2.8 million dollars* over that for the smaller and basic authorized project. (Note inclosed table of cost allocation for smaller authorized project — first cost $67.2 million (Incl. 2) and table for enlarged project with first cost of $70 million (Incl. 3)). Also, this is reflected in the Chief of Engineers May 15, 1967 letter to the Public Works Committee. However, this letter does not disclose that the percentage of repayment for an enlarged project was not increased, and the cost increase represented was primarily due to inflation.

g. It is now evident that the cost data in the 1967 GDM substantially understated the actual costs to enlarge the project, and the data was based on an incomplete design necessary for the assured earthquake safety of an enlarged water supply project. While the project costs have increased due to inflation associated with design delays, those delays were occasioned by the design matters connected with the earthquake safety for an enlarged project, and any increases in costs through inflation or design changes would nevertheless be attributed to the enlarged water supply storage project. These changes resulted from the use of a dynamic analysis method not used on the smaller project prior to the 1967 GDM. Also, the State of California engaged in an extensive review and comment on the enlarged project under its review standards due to the earthquake safety concerns expressed on the project from the California Department of Mines and Geology, and others. The design, supervision, and administration costs for the enlarged project have risen to an amount over $42 million (based on 1 January 1982 data) which is

equivalent to the *total* costs for the project prior to its enlargement.(2)

h. Your decision to direct a repayment obligation of 27% for the S.C.W.A. for the enlarged project based on the 1967 GDM cost allocation which represented a 2.8 million dollar cost increase for the enlarged project, when you know that the actual costs for that enlargement have increased many times that amount does not accord with P.L. 87-874, nor is it in accordance with 43 U.S.C. 390(b), et. seq. Your decision directing that repayment obligation of 27% be incorporated into a draft contract without performing a new allocation based on accurate and current costs is not in accordance with the above mentioned laws. Therefore, it appears to me that you have violated your mandatory statutory duties to: (1) Submit the above mentioned modification and repayment obligations for the enlarged project to Congress in accordance with 43 U.S.C. 390(b)(d), and (b) to prepare a cost allocation based on accurate and current cost data for the enlarged project which allocates to the S.C.W.A. its share of the costs for the enlarged project with the added water supply storage being incorporated into that project.

i. Although Corps District personnel have advised you that a current accurate cost allocation should be prepared, you have declined to have one prepared. Also, the Chief of Engineers Office forwarded a letter to the District dated 22 May 1981 which stated: "A new cost allocation is required." It is my understanding that Mr. Riddle, former assistant Chief of Engineering for the District urged you not to have a cost allocation performed

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(2) Also, the 12-fold increase in recreation costs, would cause a substantial decrease in the *net benefits* for recreation causing a major revision in the distribution of joint costs. If this was accurately reflected in a current and proper cost allocation, the percentage distribution of joint costs to water supply storage would increase significantly due to the decrease in net benefits for recreation.

based on accurate and current cost data, and persuaded you to use the cost sharing percentage (27%) contained in the 1967 GDM. Also, this reflects the position of Mr. Pape, former Chief of Engineering for the District.

j. P.L. 87-874, 43 U.S.C. 390 et seq., and all arrangements with the S.C.W.A. for water supply storage whether based on previous assurances or contracts provide that the cost allocation is subject to adjustment to reflect actual costs, incurred costs, and current cost data. If the San Francisco District's Engineering Department has substantially understated costs previously, then this should be timely corrected in an accurate and current cost allocation. The U.S. is not bound by inaccurate and understated costs, and the cost sharing requirements are based on an allocation which is accurate and contains current cost data. However, if the Corps does not timely advise the S.C.W.A. of an adjustment based on the true costs, the repayment assurances of S.C.W.A. may be in question, and may be illusory.

k. Your command decision not to have an accurate cost allocation prepared based on accurate and current data and a proper allocation to water supply storage may result in an invalidation of the S.C.W.A. repayment assurances. As you know, as a Contracting Officer, currently expending funds subject to repayment, your decision not to have a current, and accurate cost allocation prepared, and to delay such an allocation until after the completion of construction could be viewed as a coercive attempt to force on the U.S. a repayment percentage of 27% based on the 1967 GDM cost allocation, even though it may substantially understate the true repayment obligation to the U.S. Also, this could be viewed as an attempt to create coercive deficiences [sic] for the substantial cost increases. Using the 27% cost sharing percentage based on the inaccurate 1967 GDM cost allocation, and applying that percentage to the current total costs of 312 million dollars would merely compound and perpetuate the errors

in the 1967 GDM. Although using that method may give the appearance of a cost allocation from a superficial review, it would result in substantially understating the cost repayment to the U.S. based on a proper cost allocation, and it would result in the misdistribution of costs subject to repayment to the U.S. I have been advised by knowledgeable sources that if a current and accurate cost allocation was performed, that S.C.W.A.'s repayment obligation would increase at least $60 million over its cost allocation based on the inaccurate 1967 GDM. Thus S.C.W.A.'s cost share may be over $145 million rather than the approximately $86 million based on the 27% total repayment obligation. If the 1967 GDM allocation is inaccurate, (and there is no doubt that it is), then S.C.W.A.'s repayment assurances may be invalid and it would be inaccurate to represent that S.C.W.A. has provided adequate, valid, and full repayment assurances. Also, note *EDG v. John Marsh* 5th Cir. No. 89.3915, 1981. Repayment rights of the U.S. can not be waived nor is the U.S. bound by actions exceeding statutory authority or violating statutory duties. There is a requirement under 43 U.S.C. 390 et seq. to obtain *valid* assurances of repayment based on accurate cost data and a proper allocation before proceeding with and continuing with construction, and before expending funds, and imposing costs on the U.S. subject to repayment.

l. Your decision to extend repayments *beyond 50 years* after the project is put into operation is questionable, and in my opinion does not conform to the statutory repayment requirements of 43 U.S.C. 390(b) et seq. for several reasons:

a. It is probable that a new and proper cost allocation based on accurate and current costs would indicate the S.C.W.A. repayment obligation is substantially beyond 30%. Although the costs for water supply storage may be beyond 30%, it would be a gross misinterpretation of the law to put an artificial cap on S.C.W.A.'s cost allocation to keep it

under 30% for the purpose of deferring payments to the U.S. and extending the repayment period beyond 50 years *after* the project is put into operation. The payment term proposed extends 60 years after the project is scheduled to be put into operation for storage, now scheduled for 1983; i.e., 50 years beyond 1993 amounts to 60 years.

b. Despite OMB's objections to the use of a repayment scheme which would extend repayment for the "entire amount" beyond 50 years contrary to the requirements of 43 U.S.C. 390 resulting in a non-enforcement of U.S. repayment rights by the Corps, you propose to disregard those objections. This may result in a violation of the statute, and you were requested to have this matter resolved between the Secretary of the Army and OMB. Extending repayments 10 years (the interest rate is 3⅛%) beyond the statutory 50 year period for the "entire amount" would result in repayments in depreciated dollars resulting in the U.S. being paid back substantially less in terms of real dollars which amounts would increase even further if the average rate of inflation increased over that extended period. Since the U.S. would not be paid back within the statutory 50 year period, the non-enforcement of those statutory repayment rights would result in the U.S. losing millions of dollars (in real fixed purchasing power) each year on this project alone. Congress has not amended 43 U.S.C. 390(b) to authorize a repayment period for the "entire amount" to extend 60 years beyond the period the project is first used for the storage of water. The W.S.D.P. (the Project) will store water in 1983. There are no exceptions to the 50 year payment period in the statute which provides that the "entire amount" . . . shall be repaid within the life of the Project but *in no event to exceed 50 years* after the project is first used for the storage of water for water supply purposes. While payments do not need to be initiated for future water supply

after the Project is used for the storage of water, the statute clearly provides that the "entire amount" shall be repaid 50 years from the *date* the *project* is first used for the storage of water for water supply purposes. The statute has not been amended to allow for a period beyond 50 years, and any administrative actions purporting to extend the 50 year period would be contrary to the *mandatory* repayment period of 50 years for the "entire amount."

m. Also, you propose to defer *payment* of interest (3⅛%) beyond the 10 years prescribed by 43 U.S.C. 390(b). In my opinion, this is questionable and would add to the already substantial understatement of repayment obligations to the U.S. resulting from your "command directives."

I regret having to write this letter to you. However, it is required. Further discussions with you apparently would not resolve my legal objections to your actions, and it appears that it is your intention to rely on an inaccurate cost allocation for a 27% repayment percentage, and to proceed as noted above. Therefore, for the reasons mentioned above, I respectively decline to support or follow your command directives noted above, and I have not, and will not participate in or prepare any draft contract provisions or other similar legal documents which reflect your command directives which I have objected to on the legal grounds noted above.

Pursuant to Army Procurement Procedure 1-451(c), this letter should be forwarded to the Secretary of the Army so that he can be put on notice of the unresolved legal objections to your actions. This will be done either along with the draft contract reflecting your directives which I object to, or if this is further delayed, it will be timely forwarded separate from your draft contract because of the distinct possibility that the S.C.W.A. repayment assurances are inadequate based on the cost sharing percentage (27%) derived from an inaccurate 1967 GDM cost

SPNOC
Col. Paul Bazilwich, Jr.

allocation, and because of the substantial impact this may have on U.S. repayment rights.

Sincerely,

/s/ JAMES M. HAGOOD

JAMES M. HAGOOD
Assistant District Counsel

CF: Custodian of Records of
U.S. Army Corps of Engineers
San Francisco District, Mr. Jan Brevet

Chief, Engineering Division
San Francisco District
Mr. Jay Soper

Warm Springs Dam Contract Files
c/o Mr. Archie Hays, Chief, Procurement
and Supply Div.

Mr. Steve Lingenfelter
District Counsel, San Francisco Dist.

Mr. Martin Dense, Comptroller

CF: Mr. Scott Moseley
Special Assistant on
Warm Springs Project

ATTACHMENT A

[Letterhead]

July 1, 1982

Lt. Gen. J. K. Bratton
Chief Engineer
U.S. Army Corps of Engineers
Washington, D.C. 20314

Dear Lt. Gen. Bratton

On behalf of the City of Ukiah, California, we are writing to object to the provisions of a proposed contract pending your approval between the Corps of Engineers and the Sonoma County Water Agency ("Sonoma" or "Water Agency"). The proposed contract would change Sonoma's repayment obligation for the use of water stored at the Warm Springs Dam Project. Ukiah is particularly concerned with the tendered modification because, despite the fact that it is a *proposal* (which deviates from statutory repayment standards under the Water Supply Act of 1958) it has been relied upon by the Federal Energy Regulatory Commission ("FERC") to deny Ukiah a preliminary permit to develop the hydroelectric potential of the dam at Warm Springs.

Ukiah applied on May 27, 1980 to the FERC for a preliminary permit to study the feasibility of installing hydroelectric facilities at the Warm Springs Dam. Subsequently, on August 25, 1980 Sonoma filed a competing application and urged the FERC to reject Ukiah's application because of an alleged ability to control water releases and maximize electric generation. Sonoma has further indicated that it would restrict water releases to any other entities securing the right to generate

power at the dam and thus minimize the power potential of such a project.

The proposed contract pending your review and approval constitutes the factual predicate for the FERC's denial of Ukiah's permit application. During negotiation of the contract modification, Sonoma submitted a draft to the FERC to bolster its claimed superior generation capability. On the basis of that submittal, the Commission issued an order which granted a preliminary permit to Sonoma and denied Ukiah's application. The FERC relied on the proposed repayment schedule to conclude that it would "permit Sonoma to increase power production at Warm Springs Dam without triggering the pay-back schedule."[1] Therefore, the order concludes that based upon its relationship with the Corps, Sonoma would be able to produce substantially more power at the site than would be possible if Ukiah were the operator of the hydroelectric facility. The Commission's decision is, however, interim inasmuch as rehearing has been granted for further reconsideration of the wisdom of granting the permit to Sonoma on the basis of its bald claims.

Sonoma lacks the authority to operate the project in the manner so claimed. The Water Agency is precluded from increasing stream flows for power generation beyond those releases made incidental to the other stated purposes of the project under its present permit issued by the California Water Resources Control Board. In addition, the Water Agency has been enjoined by the Sonoma County Superior Court[2] from arbitrarily directing releases pending the submittal and approval of a comprehensive plan for coordinated operation of the Warm Springs and Lake Mendocino projects.

---

[1] Order Issuing Preliminary Permit and Denying competing Application, Project Nos. 3186 and 3351, 18 FERC §61.108 (1982), mimeo. at 3, see Appendix A.

[2] Peremptory Writ of Mandate issued August 25, 1981, attached hereto as Appendix B.

Ukiah also protests Sonoma's attempt to avoid its repayment obligation under the Water Supply Act of 1958, 43 U.S.C. 390b. The Warm Springs water supply storage contract is subject to the requirements of the 1958 Act and likewise the repayment obligations are subject to those requirements. The existing "Lake Sonoma Water Supply Contract — Warm Springs Dam Project, Dry Creek, Russian River Basin, California," No. DA-04-203-CIVENG-65-21 tracks the repayment provisions of the Act. In contrast, the draft contract runs afoul of the Act's explicit repayment obligation which provides:

> [t]hat the entire amount of construction costs, including interest during construction, allocated to water supply should be paid within the life of the project but *in no event to exceed fifty years after the project is first used for the storage of water* for water supply purposes, except that (1) no payment need be made with respect to storage for future water supply *until such supply is first used,* and (2) no interest shall be charged on such costs until such supply is first used, but it no case shall the interest-free period exceed ten years. 43 U.S.C. 390(b).

The draft contract proposes, however, rather than requiring repayment within fifty years after water storage is initiated and actual repayment upon first use of stored water, that repayment begin in 1993 and extend 49 years therefrom. Thus, the proposed repayment schedule is an attempt by Sonoma to bolster its threat to thwart the success of a Ukiah-operated project by allowing it to withhold water releases without triggering the fifty-year repayment deadline which would otherwise be imposed if the contract followed the statutory repayment schedule. Alternatively, the proposed modification would allow Sonoma to withdraw water from behind the dam before 1992 without initiating the statutory repayment obligation which would otherwise require repayment to begin when "such supply is first used." In short, under either scenario the proposed repayment schedule is an attempt to avoid

the express provisions of the Act solely to advance the interests of Sonoma.

Sonoma's objectives in modifying the terms of its contract with the Corps are clear — to thwart Ukiah's first-filed application[3] in order to obtain a preliminary permit for itself to operate at the Warm Springs Dam. Ukiah is particularly troubled by Sonoma's assertions that it intends to exercise its claimed contract rights to frustrate the optimal development and use of this multipurpose project. The Corps should not allow itself to be a party to such a scheme, especially where, as here, the proposed contract modification is violative of the Water Supply Act of 1958. Indeed, Sonoma by its proposed repayment schedule has indicated that it does not intend to make use of storage blocks 3 and 4 until the years 2000 and 2005, respectively. If hydroelectric generation can be enhanced by releases from the reservoir at Warm Springs prior to 1992, Ukiah stands ready, willing and able to develop an optimal facility and to compensate the United States for use of those blocks for which Sonoma has no present need.[4] Accordingly, Ukiah would welcome the opportunity to meet and discuss with the Corps the sharing of the costs and benefits of the project. The City of Ukiah believes that it is in the public's best interest to make balanced use of the multiple purposes envisioned for Warm Springs. And, in order to realize the benefit of hydroelectric generation before 1992, Ukiah is willing to pay proportionate costs so as to equitably share in the benefits of the project in accordance with the intent and the terms of the 1958 Water Supply Act.

In sum, the City of Ukiah objects to any contract modification which would unlawfully enhance Sonoma's existing water storage rights or which would allow Sonoma to abuse its rights to the detriment of the multiple purposes of the Warm Springs

---

[3] The Commission's regulations establish a preference for the first-filed applicant, 18 C.F.R. 4.33(g)(2).

[4] Ukiah would recognize the right of recapture by Sonoma as the need arises.

Project, including the generation of hydroelectric power therefrom, in violation of the provisions of the Water Supply Act of 1958. Ukiah is convinced that the Commission's order denying its preliminary permit application on the basis of an unexecuted contract amendment is unlawful and unsupportable. Ukiah also believes that the proposed contract is unlawful and contrary to the public interest and is committed to pursuing its rights in this matter both before the FERC and if necessary the Federal Courts.

Ukiah therefore requests that the Corps not approve any such contract modification. We further request that we be permitted to discuss with the Corps arrangements for utilization of the project to maximize its hydroelectric potential while balancing the other objectives of the Warm Springs Dam Project as contemplated by the Water Supply Act.

Your attention to this matter is appreciated. If you have any questions, please do not hesitate to contact the undersigned.

Sincerely,

Robert A. O'Neil

Attorney for the
City of Ukiah, California

Enclosure

RAO: FLK: mc

cc: Office of the Chief Engineer, DAEN:CWZG
Brig. Gen. Homer Johnstone, Jr, Division Engineer,
South Pacific Division
Major Thomas Edgerton, District Engineer,
San Francisco District
James P. Botz, Sonoma County Counsel

THE
PRESS
DEMOCRAT

Source
Santa Rosa, Calif., Sunday, Oct. 3, 1982

Pact gives water use to county

By BOB KLOSE

A new contract between the Army Corps of Engineers and Sonoma County has cleared the way for the county to make immediate and full use of Lake Sonoma at Warm Springs Dam without financial penalty.

The contract, fixing the county's repayment schedule for the dam, means taxpayers will have free use of the reservoir for nearly eight years before the county must start making payments to the federal government.

The amended contract, approved last week by county supervisors acting as water agency directors, was signed Friday by Corps officials in Washington, D.C..

Water Agency Chief Engineer Robert Beach, who announced the agreement Friday afternoon during a Santa Rosa meeting of the State Water Commission, said the new plan will allow the county to use as much water as it needs as soon as Lake Sonoma is filled, without triggering a higher payment schedule that was called for under the old agreement.

Except for recreation facilities, the dam is nearly complete and after several years of testing Lake Sonoma is projected to be full in 1985 or 1986.

Beach, who said Rep. Don Clausen, R-Crescent City, informed him of the Corps' decision only minutes before he addressed the state commission, said the new agreement will allow the county to make the most efficient use of the Russian River water system by combining the resources of both Lake Sonoma and Lake Mendocino outside Ukiah.

"It is good for the county of Sonoma and the U.S. government as well," Beach said.

"In the absence of the agreement, we could have been forced to operate (Warm Springs) at a detriment to Lake Mendocino and the Corps' recreation facilities there and it could have been totally detrimental to the government financially," Beach said.

He explained that the old agreement tended to encourage the county to restrain use of Warm Springs and thus lower its payments and ultimate payoff to the government.

Beach has been negotiating the new agreement since 1980 and with the assistance of Clausen wrapped up the deal over the last six months.

"Clausen played more than a key role. In my opinion it would not have been possible without Clausen," Beach said.

Here are some of the contract highlights, as explained by Beach:

- Unlimited use of Lake Sonoma water puts the county in a more favorable position in its contest with the city of Ukiah for rights to generate electrical power at Warm Springs Dam. Ukiah's rights to Warm Springs water would limit its power plant capacity to only 11.7 million kilowatt hours in 1985. Sonoma County now can expect to produce 18.6 million kilowatt hours, a 60 percent increase in capacity. The power will be used to cut water agency power bills and thus water rates.
- The county will be able to provide water to maintain minimum stream flows in the lower Russian River for fish and

wildlife and recreation without increasing the cost of water for urban water customers.

- The ability of Lake Sonoma to meet stream flow and urban demands below Healdsburg will put less strain on supplies in Lake Mendocino. As a result there will be more water left in Lake Mendocino for recreation and for meeting stream flow and agricultural demands between Ukiah and Healdsburg.

- Future requests by water customers, such as Marin Municipal Water District and Redwood Valley Water District in Mendocino County, can be negotiated without causing higher payments to Sonoma County. And water agencies that were not party to the Warm Springs Dam project will be required to pay charges equivalent to the cost of water paid by current water agency customers.

"The reliability of the Russian River as a water supply for both agricultural and urban use will be greatly enhanced." Beach said.

All of these issues with parties interested in a share of Warm Springs water still remain in negotiation, Beach said, but the new agreement puts the county in the position of entertaining requests for more use of the resource without having to face increased payments under the old contract with the Corps.

Sonoma County's share of the cost of the $312 million project is $96.6 million, to be paid off by 2035.

Although the actual county bill does not change under the new agreement, now payments will not increase as use of the water supply increases.

Under the old contract, payments to the Corps were scheduled to begin in 1993 or before if the county started using water from the new reservoir prior to that time.

The repayment formula was based on how much water the county used. The total water supply capacity of the dam was cut

into three equal blocks with the payment increasing as the county entered each additional block of storage space.

The original plan was apparently satisfactory to both the Corps and county when it was adopted in 1964. Since then, however, there have been new demands on Lake Sonoma water by interests who don't face the task of paying off a $96.6 million debt.

For example, although the state Department of Fish and Game's request for Lake Sonoma water for stream flow purposes appeared reasonable it could have forced Sonoma County taxpayers in a higher repayment bracket under the old agreement.

Beach said the new plan will allow the county to meet the Fish and Game demands without damaging its own pocket book.

Here's are the terms of the new agreement:

- The county can use Lake Sonoma water as soon as it is available, 1985 or 1986.
- Payments do not begin until 1993, regardless of the fact the county might begin using water eight years earlier.
- Payments will not increase as the use of water increases.

The county established a penny tax in 1971 to be used to pay off its Warm Springs bill. Beach said that fund now stands at about $2 million and will continue to accumulate and earn interest until payments begin in 1993. Given a reasonable investment return in the meantime, he said, the county should be in a good position to begin payments next decade.

Beach said the annual payment in 1993 is set at $868,000. Annual payments gradually increase to $5.9 million by 2007 when they will remain the same until the mortgage is burned in 2035.

The county is paying 3.225 percent in interest.

Although the new contract was hailed by county officials, it could give rise to "I told you so" charges by anti-dam groups that unsuccessfully opposed the project in two county elections and in the court room.

Part of the dam opponents' campaign centered on contentions the dam and increased water supply would spark uncontrolled urban growth and turn Sonoma County into a sprawling population center.

Dam supporters countered that the contract provisions for higher payments following greater use of the water would curb the county from making premature and growth-inducing use of the reservoir.

The new agreement which gives the county unlimited access to the water at no change in the pricetag eliminates financial restraints on growth.

On the other hand, former county supervisor Brian Kahn, who supported the dam despite a concern over the possibilities of it encouraging growth, said Saturday the new contract will actually eliminate one potential incentive for growth. Had the county been forced to use more water during a drought, Kahn said, it would have permanently raised the cost of water.

Faced with higher water costs, Kahn said, the county would have had to encourage development to pay for the water.

That potential is eliminated by a fixed payment, he said, allowing the county to use water to maintain the level of the Russian River and to cover water needs during a draught.

Kahn is a member of the state Fish and Game Commission.

(3)

Supreme Court, U.S.
FILED
AUG 16 1996
CLERK

No. 96-089

In The

Supreme Court of the United States

October Term, 1995

UNITED STATES OF AMERICA ex rel.,
JAMES M. HAGOOD,

Petitioner,

v.

SONOMA COUNTY WATER AGENCY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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31 pp

QUESTIONS PRESENTED

1. Whether pursuant to 31 U.S.C. § 3730(e)(4) there is no subject matter jurisdiction over Hagood's claim that fixed repayment dates in a water supply contract violated the 1958 Water Supply Act where long before he made that claim the use of fixed payment dates was disclosed in the news media, challenged in public filings with both the Federal Energy Regulatory Commission and the U.S. Court of Appeals for the D.C. Circuit and discussed in that court's published opinion.

2. Whether pursuant to 31 U.S.C. § 3730(e)(4)(B) a *qui tam* relator can qualify as an original source of information with respect to a claim based upon information not provided by the relator to the Government before filing the *qui tam* action.

3. Whether Hagood can rely on the original source exception to the jurisdictional bar of 31 U.S.C. § 3730(e)(4)(A) where he failed to argue that he was an original source in the district court.

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SUMMARY OF ARGUMENT

This case centers on Hagood's legal interpretation of the 1958 Water Supply Act (the "Water Supply Act") and his contention that certain provisions of a water supply contract between Sonoma County Water Agency (the "Water Agency") and the Army Corps of Engineers ("Corps") violate that Act. In opposing summary judgment, the two contract terms which he claimed violated the Water Supply Act are (1) the cost percentage allocated to the Water Agency and (2) the use of fixed repayment dates based on projections of when water would be first used.[1] Hagood's petition concerns only the fixed repayment date issue as Hagood has abandoned his cost allocation claim, which was rejected by both courts below.

The district court and the Ninth Circuit correctly ruled that there is no jurisdiction over Hagood's claim that the use of fixed repayment dates in the contract violates the Water Supply Act. Both courts based their decisions on the 1986 amendments to the False Claims Act which bar jurisdiction over a *qui tam* action "based upon the public disclosure of allegations or transactions in a . . . civil or administrative hearing, . . . or from the news media, unless . . . the person bringing the action is an original source of the information." 31 U.S.C. § 3730(e)(4)(A). Here, the fact that the contract included fixed repayment dates was publicly disclosed in administrative proceedings, civil litigation and the news media long before this action was filed. Indeed, Hagood's very

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[1] The Water Supply Act provides "no payment need be made with respect to storage for future water supply until such supply is first used."

argument – that fixed repayment dates based on estimated use violated the Water Supply Act – was made by a third-party in prior litigation. Moreover, Hagood did not – and could not – present evidence to meet the test of an "original source."

STATEMENT OF THE CASE

The Water Agency's repayment obligations are set forth in the 1982 water supply contract with the Army Corps of Engineers.[2] The contract includes provisions governing (1) the duration of the Water Agency's repayment obligations; (2) the deferral of interest payments; (3) the percentage of certain costs to be repaid by the Water Agency; and (4) fixed repayment dates based upon projected dates of first use.[3]

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[2] A more complete statement of the case may be found in the Ninth Circuit's opinion below. (SA-1.) The Water Agency presents this abbreviated statement to focus on facts particular to the issues raised by the petition.

[3] The Water Supply Act contains separate provisions as to each of these matters. The duration of the repayment term is stated as costs "shall be repaid within the life of the project but in no event to exceed fifty years after *the project is first used for the storage of water*. . . . " The Act allows separately for a deferral of interest: "no interest shall be charged on such cost *until such supply is first used*, but in no case shall the interest-free period exceed ten years." The allocation of costs is another, distinct provision: the allocation of costs "shall be determined on the basis that all authorized purposes served by the project shall share equitably in the benefits of multiple purpose construction, as determined by the Secretary of the Army." Finally, as to the initiation of repayment, the Act provides, "no payment need be

While with the Corps, Hagood raised concerns as to the first three provisions. After Hagood questioned the duration of the Water Agency's repayment obligation, the draft contract was revised and a 50-year repayment term was implemented in the final contract. Hagood also questioned "the deferral of interest payments allocated to future water supply beyond ten years after the plant in service date." (SA-37 *and see* SA-45.) The final contract, however, required that the repayment of interest begin by 1993 – within ten years of the plant in service date. Thus, both of these expressed concerns were resolved with the final contract, which was revised and approved after Hagood was no longer involved in the project. Neither of these first two issues was raised by Hagood in opposing the motion for summary judgment.

Hagood's concern as to the cost allocation issue was raised by Hagood while he was with the Corps,[4] rejected by both courts below, and is not included in Hagood's petition.

Unlike the other three provisions, Hagood did *not* raise any concern as to the use of fixed repayment dates while he was with the Corps. Contrary to statements included in Hagood's writ petition, the memoranda written by Hagood while he was with the Corps (SA-37 through SA-54) are silent as to any concern with fixed repayment dates based on estimated first use dates. This

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made with respect to storage for future water supply *until such supply is first used. . . .* " (Emphasis added throughout.)

[4] In fact, discussion of the cost allocation issue began before Hagood's involvement with the contract and continued thereafter.

fact was noted in the proceedings below. (*See, e.g.*, Opinion of Court of Appeals at A-7 n. 6 and A-17.) Nor is there any evidence in the record that Hagood ever raised this concern while with the Corps.

Indeed, Hagood's assertion now that he raised the issue of fixed repayment dates, either in his memoranda or otherwise, is directly contradicted by the record. In the Water Agency's statement of undisputed material facts in support of its summary judgment motion to the district court, the Agency included the statement that while with the Corps "Hagood did not raise the issue of the propriety of fixed repayment dates based on estimates of first use for water supply." In Hagood's statement in response, he admitted that this fact was undisputed. (App. 2.)[5],[6]

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[5] In addition to admitting that this matter was undisputed, Hagood objected on the basis of relevancy.

[6] In addition to misstatements as to disclosures regarding the fixed repayment dates, the petition contains other erroneous representations. For example, the petition asserts that the dam project was enlarged upon the initiative of the Water Agency. Not so. The dam was enlarged because, in early 1967, the Corps proposed to "optimize" project benefits by increasing the capacity of the reservoir. The Corps requested the Water Agency's commitment to assume this increased obligation and, based on information from the Corps and with the understanding that the additional water supply would be treated as a fourth block of water, the Water Agency provided that assurance. The prior 1964 contract provided for fixed repayment dates for three blocks of water.

Hagood also asserts that the Water Agency fraudulently failed to begin repayment "upon the trigger date of 'first use.' " (Pet. 4-5.) It is telling that Hagood does not attempt to define what he means by "first use" in making this contention. If Hagood means releases of water for non-consumptive

Nor did Hagood raise the issue of fixed repayment dates when he first brought this *qui tam* action. In fact, the *only* contract provision Hagood asserted was illegal in his mandatory section 3730(b)(2) disclosure statement to the Government when this action was filed was that of the cost allocation.[7] (App. 3-9.)

However, long before this action was filed, the very argument now made by Hagood – that the use of fixed repayment dates violates the Water Supply Act – was made by the City of Ukiah in administrative proceedings before the Federal Energy Regulatory Commission ("FERC") and a civil action arising out of those proceedings. This argument was first made by Ukiah in letters

---

purposes, the D.C. Circuit in *City of Ukiah* ruled that such releases would not trigger repayment obligations. If Hagood is arguing that the Water Agency caused releases to be made for consumptive purposes, both the district court and the court of appeals found that Hagood presented no evidence to support that claim. (A-19 n. 17 and A-42 n. 4.) And if Hagood means that "first use" for purposes of repayment occurred when water was first stored in the dam, his position is contrary to the clear language of the Water Supply Act, which states "no repayment need be made with respect to storage for future water supply until such supply is first used" – not when storage first occurs. (SA-35.)

[7] While Hagood's disclosure made a generalized reference to an avoidance of payments, nowhere is it asserted that this pertains to the issue of fixed repayment dates. In fact, because Hagood indicates repayment should have been initiated in 1984, it is clear that he was discussing something other than the initiation of repayment upon first use of water supply. In any event, Hagood's disclosure focusses solely on the cost allocation issue.

and briefs filed with FERC in 1982.[8] After FERC rejected Ukiah's arguments, the city sought review before the U.S. Court of Appeals for the D.C. Circuit. In its filings with the D.C. Circuit, Ukiah again argued that the fixed repayment dates provisions violated the Water Supply Act.[9]

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[8] On July 1, 1982, Ukiah wrote the Corps with objections to the proposed contract as being in violation of the 1958 Water Supply Act. Specifically, Ukiah argued that the fixed repayment dates violated the Water Supply Act because the Water Agency could use water before those dates without having to commence repayment. (SA-55.) On July 9, 1982, Ukiah again wrote the Corps regarding its objections to the contract. In this letter, Ukiah asserted that the Water Agency's argument to FERC, that the contract "establish[ed] a schedule of fixed payments to be made regardless of when water is actually first used," confirmed its contention that the contract was in violation of the Water Supply Act. (App. 10, 11.) On July 12, 1982, Ukiah caused its two July 1982 letters to be placed in the record of the FERC proceedings. In a subsequent brief filed with FERC, Ukiah again argued that the proposed contract would violate the Water Supply Act:

> The Water Supply Act of 1958 requires repayment within 50 years of the initiation of water storage and actual payments to begin upon first use of stored water. Accordingly, if the contract allowed Sonoma to direct releases without requiring repayment, it is Ukiah's position that the revised contract is violative of the 1958 Act and could be successfully challenged in court.

[9] In this regard, the D.C. Circuit Court of Appeals noted Ukiah's "argu[ment] that the 1982 contract is illegal under the [Water Supply Act] because the contract separates Sonoma's repayment obligation from its use of water even for water supply purposes." *City of Ukiah v. FERC*, 729 F.2d 793, at n. 11 and *see* n. 12 (D.C. Cir. 1984).

The D.C. Circuit rejected Ukiah's argument, holding the Water Agency could direct releases for non-consumptive purposes without triggering repayment under the Water Supply Act. *City of Ukiah, supra*, at 798-99. Since the appeal involved only non-consumptive uses, the court did not resolve whether other uses of water would trigger repayment under the Water Supply Act. Nevertheless, the court stated:

> Article V [the repayment provision] of the 1982 contract adheres strictly to the 50 year payback requirement and effectively to the initial repayment clause. While initial repayment may occur after the water supply is actually used for consumptive purposes, the fixed repayment schedule was drawn to reflect precisely the parties' best mathematical estimates of when consumptive use would actually begin. *Id.* at 797 nn. 11 and 12.

Thus, the D.C. Circuit (1) held that use could be made of the water supply without triggering repayment obligations and (2) recognized that the use of fixed repayment dates in the contract was not intended to delay the initiation of repayment but to identify when first use would occur as best as could be estimated.

After the contract was signed, and before Ukiah's appeal was resolved, local newspapers reported on the contract. One such article, appearing in the Santa Rosa *Press Democrat* two days after the contract was signed, reported that the contract had a fixed repayment schedule, stating "Payments do not begin until 1993 regardless of the fact the county might begin using water earlier."

REASONS FOR DENYING THE WRIT

There is no compelling reason for granting review of this case. The jurisdictional standards of the False Claim Act are not in the state of flux which Hagood describes. Moreover, review of this case would not be appropriate as the arguments presented by Hagood are not supported by the facts necessarily decided by both courts below. Indeed, for this Court to dispose of Hagood's claims, it would have to engage in a fact-finding exercise, a task rarely appropriate for this Court's attention.

I. HAGOOD MISPERCEIVES THE JURISDICTIONAL REQUIREMENTS OF THE FALSE CLAIMS ACT AND HIS ARGUMENTS ARE NOT SUPPORTED BY THE FACTS DETERMINED BY BOTH COURTS BELOW.

Hagood makes three primary arguments as to why the disclosures made in the FERC administrative proceedings and D.C. Circuit do not constitute public disclosures within the meaning of the False Claims Act. These arguments (1) ignore the fact that Ukiah had previously argued that fixed repayment dates violated the Water Supply Act and (2) rely upon the mistaken assertion that Hagood raised this issue while with the Corps.

Hagood's first argument is that "the FERC proceeding was never faced with an allegation by Ukiah or anyone else that Sonoma had committed fraud." However, neither the language of section 3730(e)(4) nor any circuit decision addressing that provision requires that an allegation of fraud be included in a prior public disclosure to raise this jurisdictional bar.

The case upon which Hagood primarily relies does not address section 3730(e)(4), but pertains to a separate

jurisdictional bar, with different requirements. In *United States ex rel. S. Prawler & Co. v. Fleet Bank*, 24 F.3d 320 (3d Cir. 1994), the issue of jurisdiction involved section 3730(e)(3), not (e)(4). Section (e)(3) is significantly different from (e)(4) as it bars *qui tam* actions "based upon allegations or transactions *which are the subject of* a civil suit or an administrative civil monetary proceeding *in which the Government is already a party.*" (Emphasis added.) In looking at this provision, the *Fleet Bank* court focussed both on the inclusion of the phrase "the subject of" and the fact that the prior proceedings must involve the Government as a party. *Id.* at 327 and 328. Given these parameters, the *Fleet Bank* court concluded that (e)(3) barred *qui tam* actions only where there had been a prior action in which the Government has sought to remedy an alleged fraud.

Unlike (e)(3), section (e)(4) more broadly pertains to public disclosures made not only in civil or administrative proceedings, but also made in the news media and other contexts. Moreover, section (e)(4) does not require that transactions or allegations be "the subject of" other proceedings, only that they be disclosed. Nor does section (e)(4) require that the Government be involved with any prior disclosure. Section (e)(4), therefore, establishes a jurisdictional bar for a far broader range of disclosures than section (e)(3).

On the other hand, section (e)(4) provides for an important caveat – it allows a person to maintain a *qui tam* action even where there has been prior public disclosure if that person qualifies as an original source. This is unlike section (e)(3), which imposes an absolute bar where the Government has already been involved with an attempt to obtain a monetary recovery in another

proceeding. Hagood's position, that section (e)(4) bars jurisdiction only where fraud has been alleged and the Government has had an opportunity to remedy such, would effectively nullify these distinctions and render section (e)(4) duplicative of (e)(3).

First, it would narrow the type of public disclosures covered by section (e)(4). For example, public disclosures made in the news media, which are expressly listed in section (e)(4), do not provide a vehicle for a monetary recovery, and, thus, would not bar a subsequent action under Hagood's analysis. Second, by requiring that a public disclosure occur in connection with a situation where the Government had the opportunity to obtain a remedy, Hagood's interpretation would effectively require the Government to be a party to a proceeding seeking a remedy. If that were the case, the absolute bar of section (e)(3) would apply and the original source exception to (e)(4) would presumably be overridden.

Circuit decisions are uniform in rejecting the argument made by Hagood. *See, e.g., Wang v. FMC Corp.*, 975 F.2d 1412, 1417 (9th Cir. 1992) (public disclosure was *not* an allegation that Bradley had "defrauded the government" through selling vehicles, but only the disclosure of selling vehicles with defects); *U.S. ex rel. Kreindler & Kreindler v. United Tech. Corp.*, 985 F.2d 1148, 1157-58 (2d Cir.), *cert. denied*, 508 U.S. 973 (1993) (*qui tam* action barred by prior public disclosure not of allegations of fraud but of a defective condition in helicopters sold to the Government); and *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Insurance Co. ("Prudential")*, 944 F.2d 1149, 1155-56 (3d Cir. 1991) (in *qui tam* action alleging insurer's claims handling procedures

resulted in fraud, public disclosure found in disclosure of the insurer's internal memoranda which obviously did not allege fraud but instead contained the claims handling information upon which the *qui tam* allegations were subsequently based).

The decision cited by Hagood, *U.S. ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994), is in accord with this line of authority. This is shown in the very passage cited by Hagood: "The language employed in § 3730(e)(4)(A) suggests that Congress sought to prohibit *qui tam* actions only when *either* the allegation of fraud *or* the critical elements of the fraudulent transaction themselves were in the public domain." *Id.* at 654 (emphasis added). Thus, it is not required that the prior action must have actually included an allegation of fraud. Instead, where as here, the facts comprising the supposed elements of the alleged fraud are publicly disclosed, that, too, will act to bar a *qui tam* action.[10]

Hagood's next assignment of error is merely a recasting of his first argument. Hagood argues that the Ninth Circuit should not have found public disclosure as to the

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[10] In arguing his point, Hagood also takes a solitary phrase from the Ninth Circuit opinion as evidencing failure to comply with section (e)(4). In the opinion, the Ninth Circuit characterized Ukiah as having "all but accused the Water Agency of fraud in its letters to the Corps." (A-16.) Hagood argues that this statement "is in conflict with the clear language of the statute which expressly requires an 'allegation.' " Hagood misreads the statute – it requires public disclosure of *either* allegations *or* transactions. Hagood also selectively ignores the remainder of the opinion which demonstrates that the Ninth Circuit's decision rested on much more than this statement.

FERC proceedings because those proceedings "did not have the substantive capacity to remedy the fraudulent activity and provide a return to the United States treasury." Again, as shown above, this is not a requirement of the statute. And, such a requirement would be absurd given that section (e)(4) bars jurisdiction where there has been public disclosure in the news media and other contexts where there is no "substantive capacity" for a monetary recovery.

Hagood's final dispute as to the public disclosure issue is that the "*qui tam* action was not 'based upon' the public disclosure of any matters in the FERC proceeding." Although unclear, it appears that Hagood is arguing that the public disclosure bar applies only if the *qui tam* action is derivative of the earlier public disclosure. This position has been rejected by nearly every circuit to consider it. *See, e.g., Springfield, supra,* 14 F.3d at 654-55 (D.C. Cir. 1994); *Kreindler, supra,* 985 F.2d at 1158 (2d Cir. 1993); *United States ex rel. Precision Co. v. Koch Industries,* 971 F.2d 548, 552 (10th Cir. 1992), *cert. denied,* 507 U.S. 951 (1993); *United States ex rel. Doe v. John Doe Corp.,* 960 F.2d 318, 324 (2d Cir. 1992); *Wang, supra,* 975 F.2d at 1416-17 (9th Cir. 1992); *Prudential, supra,* 944 F.2d at 1155-56 (3d Cir. 1991). The only circuit which apparently does not follow the majority rule is the Fourth Circuit. *See, e.g., United States ex rel. Siller v. Becton Dickinson & Co.,* 21 F.3d 1339, 1347-48 (4th Cir.), *cert. denied,* ___ U.S. ___, 115 S.Ct. 316 (1994). In reaching its decision, the Fourth Circuit relied upon the same statutory language and legislative history interpreted by other courts of appeals to reach a contrary holding.

For example, the Third Circuit emphasized that the legislative history compels rejection of the position taken by Hagood:

> One theme recurring through the legislative history in 1985 is the intent to encourage persons with first-hand knowledge of fraudulent misconduct to report fraud. Congress sought to stop the "conspiracy of silence" among employees of corporations engaging in fraud. . . . The Senate Report stresses that in order to detect fraud it was necessary to enlist the "cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity." *Prudential, supra,* 944 F.2d at 1154.

The public disclosure bar is one means of encouraging people not to sit on information of perceived fraud. By providing that persons may lose the right to pursue *qui tam* actions where another has already made a disclosure, this bar provides incentive for people to act, not wait. The bar further comports with the "twin goals of rejecting suits which the Government is capable of pursuing itself, while promoting those which the Government is not equipped to bring on its own." It would be pointless to allow a person to maintain a *qui tam* action where, as here, the claims are based upon information thoroughly disclosed long before. *See, e.g., Springfield, supra,* 14 F.3d at 651.[11]

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[11] Practical considerations also warrant rejection of Hagood's argument. Pre-trial determinations of the source of a relator's allegations would prove onerous and impractical to both the parties and the court. *See, e.g., Precision Co., supra,* 971 F.2d at 553. This is easy to see in a case such as this. At no time

For years, the circuit courts of appeal have uniformly applied the jurisdictional bar of section (e)(4)(A). The decision below comports with the line of authority. Only one circuit has presented an interpretation of that provision which comports with that argued by Hagood. This solitary case is not, of itself, reason to review the Ninth Circuit's decision here.[12]

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while with the Corps did Hagood indicate any concern as to the use of fixed repayment dates in the contract. When Hagood provided the mandated disclosure to the Government at the time of filing this action, he again did not raise any concern as to the fixed repayment dates but asserted that the contract was illegal because of the cost allocation. Only after the initiation of discovery and citation to the *City of Ukiah* decision in various pleadings did Hagood advance the claim that the fixed repayment dates constituted a separate basis for finding the contract illegal. Given the belatedness of this claim, it would surely be unwieldy to attempt to trace whether Hagood's claim is derived from something other than previously publicly disclosed materials.

[12] Hagood makes one final argument as to the newspaper article. He argues that under *United States ex rel. Rabushka v. Crane Co.*, 40 F.3d 1509, 1514 (8th Cir. 1994), the article could not have constituted a public disclosure because, he asserts, it did not "raise a reasonable inference of fraud." Reliance on *Rabushka* is misplaced. In that case, the majority looked only at portions of prior newspaper articles which spoke generally about pension-funding problems in an industry and developments with regard to a particular company which indicated that this company also faced these problems. *See, e.g., id.*, at 1512. The *Rabushka* majority thus concluded that these articles did not point to any fraud as to the particular company. Here, however, Hagood's entire claim as to the use of fixed repayment dates is that such provision would allow the Water Agency to begin using water without initiating repayments. This is exactly what was revealed in the newspaper article. That Hagood has characterized this transaction as illegal does not

II. HAGOOD'S ARGUMENT THAT HE IS AN ORIGINAL SOURCE RESTS ON A MISSTATEMENT OF FACT AND IGNORES THE DISCLOSURE REQUIREMENTS OF 31 U.S.C. SECTION 3730(e)(4)(B).

Hagood's arguments as to the Ninth Circuit's ruling that he was not an original source all rest on his faulty assertion of fact – Hagood asserts that he is an original source of this claim because he first raised the issue in his internal Corps' memoranda. As discussed above, this is not so. The memoranda to which Hagood refers discuss other, different issues. Comparison of those memoranda to the provisions of the Water Supply Act and the contract requirements clearly show that Hagood was not addressing the separate issue of fixed repayment dates. That the memoranda do not discuss the issue of fixed repayment dates was admitted by Hagood in his opposition to the Water Agency's motion for summary judgment. Further, the court below expressly concluded that the memoranda did not raise any issue as to the fixed repayment dates. (Opinion of Court of Appeals at A-7 n. 6 and A-17.)

Thus, granting a writ of certiorari would require this Court to sift the evidence reviewed by both lower courts in order to determine whether they erred as to this point of fact. Certiorari is not usually granted for this purpose, and there is no compelling reason to depart from this longstanding practice here. *See, e.g., United States v. Johnson*, 268 U.S. 220, 227 (1925). "A court of law, such as this

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diminish the fact that the entirety of the subject transaction was publicly disclosed in this article.

Court is, rather than a court for the corrections of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

Building on his erroneous statement of facts, Hagood goes on to argue that the Ninth Circuit erred in holding that a relator cannot be an original source "if the relator republishes an allegation that has already been ~~pu~~blicly disclosed even if that person has direct and independent knowledge of the fraud." (Pet. 24.) This argument, of course, presumes that Hagood had direct and independent knowledge, a fact not found by either of the courts below and directly contrary to Hagood's own admissions below.

In any event, adoption of Hagood's positions would contravene the purposes of the jurisdictional bar. To avoid parasitic suits and otherwise advance the purposes of the False Claims Act, circuit courts of appeal have held that where there has been prior public disclosure, would-be relators must have been the source of the information previously disclosed. *See, e.g., Wang, supra*, 975 F.2d at 1418 (9th Cir. 1992); *U.S. ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 17 (2d Cir. 1990). As one commentator notes, both "simple logic" and "congressional intent" support this requirement since it "ensures that only the true whistleblower can bring the qui tam suit and prohibits rewarding parasitic suits by those who do not come forward first." Boese, *Civil False Claims and Qui Tam Actions* (1994) at 4-52 to 4-53. Were Hagood allowed to

proceed, he would merely echo claims publicly disclosed and debated long ago in other litigation.

Finally, regardless of any factual dispute or other issues raised by Hagood, review of the Ninth Circuit's decision is unnecessary as it must be sustained on other grounds. As Hagood even admits, one prerequisite to qualifying as an original source is voluntarily providing to the Government before the *qui tam* action is filed the information on which the action is based. 31 U.S.C. § 3730(e)(4)(B). Hagood's disclosure did not assert a claim as to fixed repayment dates, let alone provide any information to the Government with regard to that issue. Instead, Hagood's disclosure was limited to the cost allocation claim, which is no longer at issue. Accordingly, because Hagood made no initial disclosure as to the claim presented for review, he cannot qualify as an original source. The Ninth Circuit's decision should not be disturbed.

III. THE DECISION BELOW MUST BE UPHELD BECAUSE THE WATER AGENCY DID NOT PRESENT OR CAUSE TO BE PRESENTED A FALSE CLAIM WITH REGARD TO THE USE OF FIXED REPAYMENT DATES.

Regardless of the outcome of the jurisdictional bar question, judgment in favor of the Water Agency was proper as Hagood could not demonstrate that the Water Agency knowingly caused false information to be submitted to the Government. Because both the district court and the court of appeals found no jurisdiction as to Hagood's repayment claim, neither ruled on whether the

issue presented a false claim. Had they examined the issue, summary judgment would have been affirmed on this basis, too.

Hagood did not show the contract was based on false information. There was nothing presented to indicate that the use of fixed repayment dates constituted a false claim. There was no evidence nor even an argument that somehow the estimated use dates were "falsely" calculated. Nor was there any evidence that the Water Agency otherwise made any false representation as to the fixed repayment dates. There is no question but that the Corps was well aware of the presence of that provision and the potential issues raised by its inclusion in the contract. In all, Hagood's allegations and the facts merely show, at most, that there was a legal dispute over the appropriateness of using fixed repayment dates based on estimated first use, not concealment or misrepresentation. This does not rise to the level of a false claim under any court's analysis.

Even if the use of fixed repayment dates was "false," there is no showing that the Water Agency knowingly caused the presentation of a false claim. Hagood did not meet his burden of proving that the Water Agency played an active part in presenting a contract which it knew was based on false information – there is no evidence that the Water Agency somehow believed that the use of fixed repayment dates tied to estimated dates of first use was somehow improper or beyond the Corps' authority.

Rather than presenting evidence, Hagood argued below that the Water Agency "must have known" of a falsity because it sought help in facilitating contract

approval. Hagood used this argument in alleging fraud as to both the fixed repayment dates claim and the cost allocation claim. Because the argument also pertained to the cost allocation claim, it was considered by both the district court and the court of appeals. Both courts below rejected this argument because Hagood presented no facts to support it. Hagood should not now be allowed to raise this factually devoid claim to this Court.

CONCLUSION

For the foregoing reasons, review should not be accepted. Hagood's petition rests on misstatements of fact, and misperceives both the False Claims Act and the court decisions applying the jurisdictional bar of that act. Were review granted, this Court would necessarily have to engage in a fact-finding expedition which is neither warranted nor appropriate.

Respectfully submitted,

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APPENDIX A

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ATTORNEYS FOR PLAINTIFF

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

U.S.A. *ex rel* **JAMES M. HAGOOD,**

Plaintiffs,

v.

SONOMA COUNTY WATER AGENCY,

Defendant.

_____/

NO. C-88-0991-CW

PLAINTIFF'S STATEMENT OF GENUINE ISSUES IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT AND STATEMENT OF OBJECTIONS TO EVIDENCE

Date: February 10, 1995
Time: 10:30 a.m.
Dept: Honorable Claudia Wilken

Plaintiff submits this statement of genuine issues and statement of objections to evidence in opposition to the motion for the summary judgment filed by defendant Sonoma County Water Agency.

* * *

27. In internal Corps meetings and correspondence of November 26, 1981, November 30, 1981, March 17, 1982 and March 25, [1982], Hagood adamantly expressed his "legal opinion" that the proposed contract did not comply with the 1958 Water Supply Act because: (1) the draft contract did not comply with the requirement that the "entire costs" allocated to water supply storage be repaid within 50 years as the contract provided a separate 50-year repayment schedule as to each respective block of water; (2) there was "no legal basis for authorizing the deferral of interest payments allocated to future water supply beyond 10 years after the plant in service date;" (3) the optimization of the project in 1967 had not been properly authorized by Congress, resulting in a lack of Congressional review and approval of a cost allocation for the enlarged project; and (4) a new cost allocation would need to be prepared by the Corps. Hagood did not raise the issue of the propriety of fixed repayment dates based on estimates of first use for water supply.	27. Undisputed. Objection. Relevance.

* * *

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April 8, 1988

Mr. Joseph P. Russoniello
U.S. Attorney
Department of Justice
450 Golden Gate Avenue
San Francisco, CA 94102

RE: *United States of America ex rel. James M. Hagood v. Sonoma County Water Agency, et al.*
United States District Court for the Northern District of California
Civil Action No. C880991EFL

Disclosure Statement Under 31 U.S.C. Section 3730

Dear Mr. Russoniello:

Under 31 U.S.C. Section 3730 enclosed herewith is the disclosure statement and documentary evidence (48 tabs of documents in attached 3-ring binder) relating to the above-referenced suit. These materials and the narrative information contained in this letter are being submitted by qui tam plaintiff James M. Hagood to the United States for review and consideration. Both Mr. Hagood and his counsel herein are available to further explain and review the evidence in this lawsuit.

This is an action under the False Claims Act, 31 U.S.C. Section 3729 et seq., concerning the Warm Springs

Dam Project in Sonoma County, California. It is an action to recover amounts not repaid between 1984 and 1988 to the United States as a result of false claims, and for other amounts falsely understated so as to avoid repayments to the United States. As of March 1988, four years after completion of the Federal Dam Project, no amounts of money have been repaid to the United States, although required by statute under 43 U.S.C. Section 390b and 16 U.S.C. Sections 460(L)(12)-(L)(14), as amended by P.L.93-251. Specifically, the law dictates that the Government bears costs only to the extent they are properly allocated for flood control, without repayment, but the local interest (in this case the Sonoma County Water Agency) must fully reimburse the Government for costs which are required to be properly allocated for water supply and recreation facilities, as modified, and as provided by the above-referenced 1958 Water Supply Act and The Federal Project Recreation Act.

Mr. Hagood has personal knowledge of the Project acquired between 1972 and the present. During the relevant periods 1972 through 1986, Mr. Hagood was a civilian attorney working for the district office of the Army Corps of Engineers in San Francisco and Sacramento.

In early 1982 Mr. Hagood was asked by his superior, Steve Lingenfelter, to prepare a new repayment contract to replace the 1964 contract which was based upon projected costs of approximately $42,000,000 and a smaller project. Mr. Hagood made inquiries as to the preparation of a new cost allocation, as required by the statute, and as required by officials in Washington D.C. (see Tabs 7 and 11). Instead, Mr. Hagood was handed a letter dated October 24, 1974, which was signed by Henry Pape, who had

been the Chief of Engineering for the Corps in San Francisco. The letter was directed to the Sonoma County Water Agency, and apparently pre-set the cost allocation, although the costs had not been incurred or set at that time. (See Tab 14). Prior to 1982, Mr. Hagood had never seen the letter in question. It was also shown to him by Robert F. Beach, the General Manager of the Sonoma County Water Agency, when Mr. Hagood discussed the matter with him. The letter was used to pre-empt any further discussion about a required and current cost allocation. The percentage reflected in the letter was simply taken from the 1969 General Design Memo, again prior to the actual and current costs incurred for the Project, as modified.

Mr. Hagood was essentially informed that a cost allocation was not going to be performed based on the true costs, as they had been expended as of 1982. When Mr. Hagood was ordered to prepare the repayment contract in 1982 using the rate that had been previously agreed upon between Mr. Pape and the Agency, Mr. Hagood put the top manager of the Corps on notice of the requirements for a cost allocation based on current and accurate data, and he further put management of the Corps in San Francisco on notice that he would not participate in preparing a false repayment contract. (See Tabs 12, 13 and 19). In July 1982, Mr. Hagood was transferred to Alaska, and he has not worked for the San Francisco District of the Corps since April 1982. Mr. Hagood had requested that his letter of notice be forwarded through Department of Army Channels to the Secretary of the Army. (See Tab 19, p. 7) This was not done. Mr. Hagood has requested this letter and other

materials through the Freedom of Information Act, and the letter has not yet been produced. It is believed that the letter was destroyed by individuals in the San Francisco District of the Corps.

In spite of the request for a current cost allocation and the requirements of the law, a proposed contract was forwarded for approval without a current cost allocation. (See Tab 20) It was subsequently represented to higher command that a current allocation had in fact been performed. (See Tab 23) In addition to the 1974 "Agreement" to pre-set the cost allocation, there is compelling evidence that the Sonoma County Water Agency did an "end-around" to have the false cost allocation and the contract approved. (See Tabs 25, 26, 27 and 28). There is evidence that the Agency enlisted the assistance of a United States Congressman to shepherd the contract through without a cost allocation. In fact, the contract was forwarded to the Assistant Secretary of the Army in the Pentagon on September 30, 1982, and it was signed less than a day later, despite the fact that it did not contain a valid and current cost allocation. (See Tabs 24 and 25).

When the Army Corps of Engineers went back to Congress to obtain additional appropriations for the enlargement and modification of Warms Springs Dam, assurances were given that the local interests (Sonoma County Water Agency) would pay for the additional costs of water supply. The following colloquy took place at the Senate hearings for Public Works Appropriations in fiscal 1968:

> Senator Ellender. Who gets the benefits of the additional water you are holding back?

General Dillard. The additional water is for water supply.
Senator Ellender. For water supply for what communities? Is there any recreation?
General Dillard. The water is for Sonoma and Marin Counties, sir. There is some recreation in the project.
Senator Ellender. *I thought we had some kind of rule maybe a law that required the community that would benefit from the additional water to pay the additional cost?*
General Dillard. *That is correct, sir. The cost of the water supply storage in the reservoir is repayable by the local interest. In this case we have a firm contract already signed for 132,000 acre-feet of water. This storage will be in three blocks. What we provide beyond that by increasing the size of the dam to maximize the water resource usage is a block of water which the Sonoma County Water Agency has given us assurance that they will contract for that block of water in addition to the repayment contract we already have.*
Senator Ellender. Will any of that be for recreation?
General Dillard. No, sir.
Senator Ellender. Just for the city use?
General Dillard. For industrial and residential use. Yes, sir.
Senator Ellender. What will the cost be to provide this additional water and how much of that cost will be paid by the city? While you are figuring that, I note you are allocating only $1,800,000 of the $2,700,000 appropriated for this project in fiscal year 1967. What is the reason for the reduction in the allocation of the funds appropriated for this project?

> General Dillard. Sir, the $1,800,000 excludes $900,000 taken for savings and slippages. This project reduction is for savings and slippages, because with adequate funding after fiscal year 1967, we could still complete the project on schedule. (Senate Hearings, Public Works Appropriations, 1968, H.R. 11641, p. 904) [Emphasis added.]

The costs of the Project in fact rose dramatically. Rather than comply with the law, an illegal agreement was reached between the Sonoma County Water Agency and local representatives of the Corps of Engineers to fix the percentage of cost allocated to water supply at 27.76% which was the estimate given in the 1969 General Design Memo. This illegal and unauthorized agreement was apparently made in 1974, and it was carried forward by Mr. Lingenfelter and Henry Pape's successor Jay Soper, reduced to writing and forwarded for approval without any reference to the "arrangement" which had been reached. To date, no valid and current cost allocation has been conducted, and all indications are the allocation for water supply would exceed 50% for this Project which has exceeded $300,000,000, all to the considerable detriment of the U.S. Treasury.

Both Mr. Hagood and I are prepared to fully cooperate with the Government in reviewing these and other materials in connection with this suit.

Respectfully submitted,

Lawrence G. Townsend

LGT:lm

cc: By Certified Mail/Return Receipt
The Honorable Edwin Meese, III
Washington D.C.

Mr. Michael F. Hertz
Director, Commercial Litigation Branch
Dept. of Justice
P.O. Box 261
Benjamin Franklin Station
Washington, D.C. 20044

Enc.: 1) Summons and Complaint
2) Order To Have Complaint Filed In Camera and Kept Under Seal
3) Order Setting Status Conference
4) 3-ring binder with 48 Tabs of documents

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July 9, 1982

Lt. Gen. J. K. Bratton
Chief Engineer
U.S. Army Corps of Engineers
Washington, D.C. 20314

Re: *Proposed Amended Contract Between the United States of America and the Sonoma County Water Agency for Water Storage in Lake Sonoma, Warm Springs Dam Project.*

Dear Lt. Gen. Bratton:

On June 28, 1982, the Sonoma County Water Agency ("Sonoma" or "Water Agency") filed with the Federal Energy Regulatory Commission a description of the distinctions between its existing contract for the storage of water at the Warm Springs Dam Project and the proposed contract amendment presently pending your review.[1] Certain statements made in that pleading are particularly striking and deserve your attention before any final action is taken on the draft agreement.

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[1] Attached as Appendix A.

In its pleading, the Water Agency states that one of the primary reasons for amending the present contract is because,

> "it is not possible to determine, under the terms of the original agreement, the dates when Sonoma's obligations to begin repayment for each block of stored water will arise."[2]

This is either a misstatement or a demonstration of Sonoma's fundamental misunderstanding of its existing contractual and statutory obligations under the 1958 Water Supply Act. That Act clearly provides that repayment is to commence when such water in storage "is first used" and that total repayment shall "in no event . . . exceed fifty years after the project is first used for the storage of water . . . " 43 U.S.C. Sec. 390(b).

In contrast, Sonoma claims that the,

> "new agreement, by establishing a schedule of fixed payments to be made regardless of when water is actually first used, assures that it is not economically detrimental for Sonoma to control releases from storage to optimize power production."[3]

This statement confirms our contention that the purpose of the proposed amendment is to permit Sonoma to realize the economic benefit of water stored at the Warm Springs Dam without rendering payment to the United States as required by Water Supply Act. The Act clearly demonstrates Congressional intent that the United States

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[2] *Id.* at 2.

[3] *Id.* at 3.

be compensated for, and upon, the derivation of benefits from water supplied by a Corps-operated facility. Sonoma's intent in negotiating a revised contract is clearly to receive the benefit of the water stored at Warm Springs without paying for it in accordance with the express directive of the Congress. Consequently, the above statement highlights the fact that approval of the proposed contract amendment by the Chief Engineer would be a deviation from the Corps' statutory authority and thus constitute an action *ultra vires* of the Water Supply Act.

Accordingly, the City of Ukiah herein reiterates its objections to the approval of the proposed contract amendment by the Chief Engineer.

Sincerely,

/s/ Robert A. O'Neil/FLK
Robert A. O'Neil

Attorney for the
City of Ukiah, California

Enclosures

RAO:FLK:ch

cc: Office of the Chief Engineer, DAEN:CWZG
Brig. Gen. Homer Johnstone, Jr., Division Engineer, South Pacific Division
Major Thomas Edgerton, District Engineer, San Francisco District
James P. Botz, Sonoma County Counsel

Supreme Court, U.S.
FILED
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(4)

No. 96-89

IN THE

Supreme Court of the United States

October Term, 1995

UNITED STATES OF AMERICA, *EX REL.*
JAMES M. HAGOOD,

Petitioner,

vs.

SONOMA COUNTY WATER AGENCY,

Respondent.

On Petition for Writ Of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petitioner's Reply Brief

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PETITIONER'S REPLY BRIEF

Petitioner James M. Hagood submits this reply brief to correct significant mischaracterizations contained in respondent's opposition brief.

I. CONFLICT WITHIN THE CIRCUITS

Respondent has argued in its opposition brief that a conflict does not exist within the circuit courts of appeal on the jurisdictional standards to be applied in qui tam actions. However, respondent does not explore its argument beyond the mere allegation of an absence of conflict. Having made the assertion, respondent then claims the petition arises from disputed factual issues and is therefore unworthy of review by the United States Supreme Court.

The intercircuit conflict regarding qui tam jurisdictional standards cannot be eliminated by a simple assertion of its non-existence. In his petition, Mr. Hagood demonstrated a sharp and pervasive conflict on essentially every element of 31 U.S.C. §3730(e)(4). The existence of this conflict has been the subject of other petitions for writ of certiorari, at least one of which is currently pending before this Court. *Hughes Aircraft Company v. United States ex rel. Schumer,* No. 95-1340, 64 U.S.L.W. 3593. Moreover, the conflict has intensified to such a level that it has become the subject of discussion within the opinions of the circuit courts themselves. Most recently, the Tenth Circuit Court of Appeals noted that "our sister circuits are divided" on the standards to be applied in interpreting the "allegations or transactions"

provisions of 31 U.S.C. §3730(e)(4). *United States ex rel. Ramseyer v. Century Healthcare Corporation*, 90 F.3d 1514, 1996 WL 412819, *3 (10th Cir. 1996).

Mr. Hagood's petition presents a unique opportunity for this Court. While other petitions, including *Schumer*, involve a limited number of jurisdictional standards, the issues presented in Mr. Hagood's petition encompass essentially every standard under 31 U.S.C. §3730(e)(4). Thus, review of this case would permit the Court to determine the proper interpretation to be given the following elements of 31 U.S.C. §3730(e)(4): "public disclosure," "allegations or transactions," "news media," "original source," "direct and independent knowledge," and "voluntarily provided."

II. MISCHARACTERIZATION OF PETITIONER'S CLAIM FOR RELIEF

In its opposition brief, respondent has mischaracterized petitioner's claim for relief. No less than 36 times Sonoma County Water Agency has described Mr. Hagood's claim with the phrase "the fixed repayment dates" claim. This semantic limitation commences on the first page of respondent's brief and continues unabated to the last page. Each of respondent's arguments relies upon that particular semantic construct. In doing so, Sonoma bases its arguments on a nonexistent strawman. The following are demonstrative:

- On pages 3 and 4 of its opposition brief, Sonoma claims Mr. Hagood did not "raise any concern as to the use of fixed repayment dates while he was with the Corps . . . ", and

that memoranda written by him were "silent as to any concern with fixed repayment dates based on estimated first use dates." While Mr. Hagood takes issue with those assertions, they only have importance to the extent Mr. Hagood's claim can be characterized as a "fixed repayment dates" claim. Otherwise, raising that narrowly defined issue in any forum would have been of no significance.

- On pages 5-7 of Sonoma's opposition brief, it argues that the Circuit Court of Appeals for the District of Columbia "held," "recognized," and "stated" that the fixed repayment dates of the contract were not violative of the Water Supply Act. *City of Ukiah v. FERC*, 729 F.2d 793 (D.C. Cir. 1984). The relevance of the *Ukiah* decision has been previously discussed by petitioner in his brief. *See*, in particular, the discussion on pages 14-21 of the Petition for Writ of Certiorari. This Court can make its own determination as to the propriety of using words such as "held," "recognized," and "stated," when describing any comments made by the *Ukiah* court regarding "fixed repayment dates", but it is of some significance that respondent – in using such words – refers to *dicta* contained not even in the text of the *Ukiah* opinion but rather in footnotes to that opinion. Mr. Hagood's investigation and complaints preceded the *Ukiah* transactions relied upon by respondent, making him the original source for purposes of the statute. Moreover, the *Ukiah* decision was rendered before the commencement of Sonoma's fraudulent failure to

make payments pursuant to the Water Supply Act, and, accordingly, the decision did not – and could not have – addressed the fraudulent misconduct that is the basis of Mr. Hagood's repayment claim. Finally, as with Sonoma's contention that Mr. Hagood made no specific reference to "fixed repayment dates" in earlier memoranda, Sonoma's arguments concerning *Ukiah* are dependent upon Mr. Hagood's claim being characterized as a "fixed repayment dates" claim. It is not.

- Sonoma's jurisdictional arguments contained in pages 8-14 posit a "fixed repayment dates" claim. It is not.

- On pages 15-17, Sonoma contends that Mr. Hagood did not make initial complaints concerning the fixed repayment dates. While petitioner disagrees with that assertion, it is a point that would only be relevant if Sonoma's characterization of Mr. Hagood's claim were correct.

- Likewise, on pages 17-19, respondent argues that the original source doctrine is not applicable because, inter alia, Mr. Hagood did not criticize the fixed repayment dates in the contract when he made his prefiling disclosure to the Attorney General.[1] Again, Mr.

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[1] The statements made by Sonoma County Water Agency in its opposition brief concerning the prefiling disclosures to the Attorney General are particularly disturbing. The extensiveness of Mr. Hagood's compliance with the requirements of 31 U.S.C. §3730(c)(4)(B) is well established in the record of this case. Respondent's portrayal is, to say the least, misleading. On February 19, 1988 – more than a month before Mr. Hagood filed

> Hagood disagrees with that particular assertion, but – more germane – the argument lacks relevance inasmuch as Mr. Hagood has not presented a "fixed repayment dates" claim.

Respondent's portrayal of Mr. Hagood's claim as the "fixed repayment dates" claim is only useful for the

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his complaint under seal with the United States District Court for the Northern District of California – Mr. Hagood's counsel sent a registered letter to the Honorable Edwin Meese III. The letter is found in the record below as ER-88 and 89 and is reprinted in the Appendix hereto at RA-1-3. As explained in Mr. Hagood's petition (pages 4-5), the claim presented by Mr. Hagood for this Court's review concerns his *repayment claim*, not a "fixed repayment dates" claim. That claim concerns Sonoma's fraudulent failure to make payments to the federal treasury as required by the Water Supply Act. This fraud was specifically presented by Mr. Hagood's counsel in the February 19, 1988 letter, which stated in part as follows: "Since 1983 the United States may have incurred damages in the tens of millions of dollars resulting from the total absence of any repayments on this matter caused by misleading or false statements and knowing failures to obtain required approvals. I believe time is of the essence, and the Justice Department is alerted by this notice of the matters in question." In addition to having "voluntarily provided the information to the government" with this letter, as required by 31 U.S.C. §3730(e)(4)(B), Mr. Hagood went several steps beyond these requirements. Mr. Hagood's counsel stated in the letter "[a]ll of the documents which my client has on this matter will be made available for the Justice Department's review in my office"; in addition, the letter explicitly solicited a meeting to fully discuss the matter and pledged Mr. Hagood's full cooperation with the Justice Department. Forty-eight tabs of documents and information were available for review. The government – through the Attorney General and the Department of Justice – chose not to avail itself of these offers.

purpose of constructing a straw argument. As discussed in Mr. Hagood's petition,[2] his claim for relief has been, and continues to be, a repayment claim. As mentioned on pages 4-5 of the petition, this claim is based upon the fact that Sonoma "had used false information and concealed other information to avoid the terms of repayment required under the Water Supply Act a) by fraudulently failing to make payments to the federal treasury in spite of the fact that the "trigger date" (first use) had occurred, and b) by attempting to reduce and conceal its repayment obligations through the use of a fraudulently negotiated contract with the Corps of Engineers."

Mr. Hagood had alleged from the outset of his investigation – an investigation that predated *any* action relied upon by respondent – that the repayment schedule itself was invalid and unenforceable; he had alleged that the negotiation and execution of the amended contract, including the fixed repayment schedule, were evidence of Sonoma's fraudulent misconduct. But the actionable conduct under this claim for relief arises from the factual allegations he has made in these proceedings concerning the fraudulent failure by Sonoma to make payments to the federal treasury once it commenced "first use" of the water supply from Warm Springs Dam.

III. ELIMINATION OF ORIGINAL SOURCE DOCTRINE

The argument presented by respondent in its opposition brief would eliminate the original source doctrine

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[2] See pages 4-5 and FN 7 at page 6 of the Petition.

from the False Claims Act. 31 U.S.C. §3730(e)(4)(A) provides that a court shall not "have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions. . . . " Mr. Hagood's petition details the reasons the FERC proceeding and the laudatory newspaper article do not qualify under this public disclosure provision. The argument presented by respondent in its opposition brief is dependent upon the characterization of the "allegations or transactions" relating to the "fixed repayment dates." As mentioned previously, that characterization is inaccurate.

Of equal significance, however, is the fact that respondent ignores the importance of the original source doctrine. Congress expressly excluded original sources from this provision. There can be no doubt that Mr. Hagood qualifies as the original source concerning Sonoma's fraudulent failure to make payments pursuant to the Water Supply Act. His investigation commenced in 1981 and his internal memoranda were written well before the *Ukiah* letters relied upon by respondent. Once first use commenced, after the 1984 "plant in service date," Sonoma County Water Agency began its pattern of fraudulently failing to repay the government as required by the terms of the Water Supply Act.

The record is entirely devoid of any individual, agency, or department making any complaint whatsoever concerning the resulting damage to the federal fisc other than Mr. Hagood. He observed water flowing from the dam into the respondent's water system; he took pictures of the usage; he examined records maintained by the

Sonoma County Water Agency and the Corps of Engineers to determine that Sonoma had failed to make payments to the federal government during that period.

During the litigation he presented these facts to the court and he also presented affidavits, including an affidavit from a professional hydrologist who testified concerning Sonoma's usage. Sonoma's fraud has gone unrectified for more than ten years, and that fact stands as stark testament to the importance of qui tam actions in policing fraud committed against the federal treasury.

IV. CONCLUSION

Issuance of a writ of certiorari in this case will permit this Court to determine the jurisdictional standards to be applied to qui tam actions. Intercession by the United States Supreme Court is warranted, not only to review the ruling of the Ninth Circuit Court of Appeals in this case, but also to resolve the intercircuit conflict that permeates decisions of the circuit courts of appeal.

Respectfully submitted,

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APPENDIX

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February 19, 1988

REGISTERED MAIL

The Honorable Edwin Meese, III
Attorney General of the United States
Main Justice Building, Suite 5111
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Washington, D.C. 20536

RE: Fraud against United States in connection with Federal Project in Northern California; False claims to reduce repayments to United States; Notice to Department of Justice

Dear Mr. Meese:

This letter is on behalf of my client who is currently a resident of California.

It concerns a fraud which we believe has been perpetrated against the United States in connection with the approval of a repayment contract on a federal project in California so as to deny the United States its full repayment required by law.

My client has information and documents which indicate that the amounts of repayment were reduced by over 50 Million Dollars, and this occurred through false

statements made, and false records used which caused a decrease in the repayment obligation to the United States.

All of the documents which my client has on this matter will be made available for the Justice Department's review in my office. Further, my client is willing to meet with Justice Department attorneys to discuss this matter, and full cooperation will be made by my client with the Justice Department on this matter.

Since 1983 the United States may have incurred damages in the tens of millions of dollars resulting from the total absence of any repayments on this matter caused by misleading or false statements and knowing failures to obtain required approvals. I believe time is of the essence, and the Justice Department is alerted by this notice of the matters in question.

If the Department of Justice, through its appropriate representatives, and on behalf of the United States, desires to make an appointment to review the documents which are available for review in my office, or to meet with my client to fully discuss this matter in my office, please advise me by forwarding your communications directly to me.

Thank you for your prompt attention to this matter.

Very truly yours,

Lawrence G. Townsend

LGT:lm

cc: By Registered Mail/Return Receipt
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